In the Supreme Court of the United States

OCTOBER TERM, 1948

No. —, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA

MOTION FOR LEAVE TO FILE COMPLAINT

The United States of America, by its Attorney General and its Solicitor General, asks leave of the Court to file its complaint against the State of Louisiana submitted herewith.

TOM C. CLARK,
Attorney General.
PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1948.

STATEMENT IN SUPPORT OF MOTION

The United States seeks to bring this suit against the State of Louisiana under the authority of Article III, Section 2, Clause 2 of the Constitution of the United States. The purpose of the litigation is to establish the rights of the United States to the lands, minerals and other things

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underlying the Gulf of Mexico adjacent to the coast of Louisiana, seaward of low water mark along the coast and outside of bays, harbors, rivers and other inland waters.

The rights of the United States in the lands underlying the Pacific Ocean adjacent to the State of California were established by this Court in *United States* v. *California*, 332 U. S. 19. It is the position of the United States that the rule there announced is equally applicable to the sea bed and subsoil of the Gulf of Mexico adjacent to Louisiana.

The territory out of which the State of Louisiana was created originally belonged to the United States, having been acquired from France under the Treaty of April 30, 1803, 8 Stat. 200. By the Act of April 8, 1812, 2 Stat. 701, the State of Louisiana was admitted into the Union "on an equal footing with the original states, in all respects whatever." The conditions under which Louisiana was admitted to the Union are similar in all respects to those under which California became a State.

Since 1915, Louisiana has, by statute (Act 30 of 1915, Louisiana Acts 1915, page 62, as superseded by Act 93 of 1936, Louisiana Acts 1936, page 276, as amended) undertaken to provide for the leasing of lands underlying the Gulf of Mexico for the exploitation of petroleum, gas, and other mineral deposits. And since 1938, Louisiana has claimed an outer boundary of twenty-

seven marine miles from its shores within which the State claims full and complete ownership (Act of June 30, 1938, Acts 1938, p. 169). Under the provisions of the statutes referred to, Louisiana has executed leases and the lessees thereunder have extracted and are continuing to extract petroleum and other minerals from lands underlying the open waters of the Gulf of Mexico.

It is reported that certain of these leases have been entered into by the State and its lessees subsequent to June 23, 1947, the date of the decision of this Court in the *California* case. Officials of the State of Louisiana have stated that they do not regard the rule announced in the *California* case as applicable to submerged lands adjacent to Louisiana, and that a continuation of the various activities of the State in connection with the development of oil and gas in lands underlying the Gulf of Mexico is contemplated, in violation of the rights of the United States. Accordingly, it is believed that the rights of the United States can be protected only by a decree of this Court granting the relief prayed for in the complaint.

It is respectfully submitted that the motion for leave to file the complaint should be granted.

TOM C. CLARK,
Attorney General.

PHILIP B. PERLMAN,
Solicitor General.

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UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA

COMPLAINT

The United States of America, by its Attorney General and its Solicitor General, brings this suit against the defendant, the State of Louisiana, and for its cause of action states:

I

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States.

II

At all times herein material, plaintiff was and now is the owner in fee simple of, or possessed of paramount rights in, and full dominion and power over, the lands, minerals, and other things underlying the Gulf of Mexico, lying seaward of the ordinary low-water mark on the coast of

Louisiana and outside of the inland waters, extending seaward twenty-seven marine miles and bounded on the east and west, respectively, by the eastern and western boundaries of the State of Louisiana.

III

The State of Louisiana claims some right, title, or interest in said lands, minerals, and other things adverse to the United States.

IV

In the exercise of the rights claimed by it, the State of Louisiana has, by general law, Act 30 of 1915 (Louisiana Acts, 1915, page 62), as superseded by Act 93 of 1936 (Louisiana Acts, 1936, page 276), as amended, authorized the leasing of lands underlying the Gulf of Mexico for the exploitation of petroleum, gas and other mineral deposits in the area herein described.

V

Pursuant to that law, the State of Louisiana has negotiated and executed such leases with various persons and corporations, and those persons and corporations have, in violation of the rights of the United States, paid to the State substantial sums of money, entered upon said lands and drilled wells for the recovery of petroleum, gas and other hydrocarbon substances. Such wells have been producing quantities of petroleum, gas and other hydrocarbon substances, which the les-

sees of the State have taken and converted to their own uses and for which the lessees have paid to the State substantial sums of money in bonuses, rents and royalties reserved under the leases, but neither the State nor its lessees have recognized the rights of the United States nor have they paid to the United States either the value of the petroleum and other things taken from the area, or any royalties thereon.

VI

The State of Louisiana has no title to or interest in any of the lands in the area herein described, but possesses only those governmental powers which it has with respect to other lands of the United States within the lawful territorial jurisdiction of the State.

VII

The State has frequently and publicly denied the rights and powers of the United States in the area herein described and has claimed full and complete ownership of the area for itself and, unless the rights of the United States are established and declared by this Court, the State will continue to claim such ownership for itself and to exercise the rights incident to such ownership through its officers, agents and employees, and will continue to aid, abet and encourage others, as its lessees, to trespass upon and to take and use the minerals and other things of value in the area, in

violation of the rights of the United States, from which the United States will suffer irreparable injury, and for which it has no adequate remedy except by this action.

Wherefore, plaintiff prays that a decree be entered adjudging and declaring the rights of the United States as against the State of Louisiana in the area herein described, enjoining the State of Louisiana and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States, and requiring the State of Louisiana to account to the United States for all sums of money derived by it from the area herein described subsequent to June 23, 1947.

TOM C. CLARK,
Attorney General.
PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1949

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SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

The State of Louisiana has filed with the Court its objections to the granting of the motion of the United States for leave to file its complaint herein. In support of its objections the State urges, in substance, that this Court is without jurisdiction to entertain a suit brought by the United States against a State without the consent of the State and that the rulings of this Court to the contrary, as announced in *United States* v. *Texas,* 143 U. S. 621, and subsequent decisions, are erroneous and should be overruled.

The decision in *United States* v. *Texas* was based upon a most comprehensive analysis of the problem; the decision is correct; it has been re-

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peatedly followed;[1] and there is no reason for overruling it. It is unthinkable that under our constitutional system a State may not be sued by the United States without its consent. As the Court appropriately observed in the *Texas* case (143 U. S. at 644–645):

> We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign States, intended to exempt a State altogether from suit by the General Government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States, and that the permanence of the Union might be endangered if to some tribunal was not entrusted the power to determine them according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately committed than to that which the people of the United

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[1] *United States* v. *Michigan*, 190 U. S. 379; *United States* v. *Oklahoma*, 261 U. S. 253; *United States* v. *Minnesota*, 270 U. S. 181; *United States* v. *Utah*, 283 U. S. 64; *United States* v. *Oregon*, 295 U. S. 1; *United States* v. *Arizona*, 295 U. S. 174; *United States* v. *West Virginia*, 295 U. S. 463; *United States* v. *Alabama*, 313 U. S. 274; *United States* v. *Louisiana*, 318 U. S. 743; *United States* v. *Wyoming*, 331 U. S. 440; *United States* v. *California*, 332 U. S. 19. See also *Oklahoma* v. *Texas*, 252 U. S. 372, 258 U. S. 574; *Nebraska* v. *Wyoming*, 325 U. S. 589.

States, in order to form a more perfect Union, establish justice and insure domestic tranquillity, have constituted with authority to speak for all the people and all the States, upon questions before it to which the judicial power of the nation extends?

The suit which the United States here seeks to file against the State of Louisiana is one which clearly calls for the exercise by this Court of the original jurisdiction conferred by Article III, Section 2, Clause 2, of the Constitution. As set forth in the statement in support of the Motion for Leave to File Complaint (p. 3), the State is proceeding with the exploitation of lands underlying the open waters of the Gulf of Mexico and is refusing to recognize the rights of the United States in such lands. There is here presented, therefore, "a clash of interests which between sovereign powers could be traditionally settled only by diplomacy or war. The original jurisdiction of this Court is one of the alternative methods provided by the Framers of our Constitution." *Nebraska* v. *Wyoming,* 325 U. S. 589, 608 (in which the United States intervened).

Of particular significance in connection with this question is the case of *United States* v. *California,* No. 12, Original, now before this Court for certain supplemental determinations. The jurisdiction under which the Court heard and rendered its decision in the *California* case (332 U. S. 19) is the same as that now invoked by the United

States in respect to its controversy with the State of Louisiana.

The motion for leave to file the complaint should be granted.

TOM C. CLARK,
Attorney General.
PHILIP B. PERLMAN,
Solicitor General.

JANUARY, 1949.

U. S. GOVERNMENT PRINTING OFFICE: 1949



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STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

STATEMENT

The question presented by this motion and the objections thereto filed by the State of Louisiana [1] is whether the United States may institute in this Court an original proceeding against a State of the Union in the absence of the specific consent of that State. The United States, in its proposed complaint, has set forth the circumstances whereby a controversy between the parties exists (cf. *United States* v. *California,* 332 U. S. 19, 24–26)

[1] The State has filed a document entitled "Objections to Motion for Leave to File Complaint by the United States against the State of Louisiana," which we shall refer to as "Objections to Motion." It has also filed a supplemental memorandum, which we shall refer to as "Supplemental Memorandum in Support of Objections."

and has stated that the jurisdiction invoked is that defined in Article III, Section 2, Clause 2, of the Constitution. The State has not suggested that the matters set forth in the proposed complaint are not sufficient to establish a case or controversy, nor has it taken the position that this Court should not, in the absence of other objections, exercise its original jurisdiction in a suit to which a State is a party defendant. The objections made by the State have been directed to the suability of the State by the United States in any court, it being asserted (Objections to Motion, p. 1) that "Louisiana is a sovereign State which cannot be sued without its consent, and which has not consented to be sued herein."

The State recognizes that its position is contrary to *United States* v. *Texas,* 143 U. S. 621, but asks that the decision be overruled, suggesting that it has already been discredited by *Kansas* v. *United States,* 204 U. S. 331. (Objections to Motion, pp. 5–7, 10–12.) And in further support of its position it relies upon what it alleges to be the understanding of the members of the Constitutional Convention. (Supplemental Memorandum in Support of Objections, pp. 5–8.) We respectfully submit that none of the State's contentions can be sustained, either in principle or in fact. We shall undertake to show, first, that it has become firmly established by the decisions of this Court that the United States may bring suit against a State of the Union pursuant to Article

III, and second, that not only is there nothing in the history of the Constitutional Convention that calls for a different conclusion, but the contemporaneous statements of certain Members of the Convention affirmatively support the results reached in the unbroken line of decisions of this Court.

I

DECISIONS OF THIS COURT

The argument advanced by the State of Louisiana is directed, primarily, against the decision rendered by this Court in *United States* v. *Texas*, 143 U. S. 621, which holds that the specific consent of the defendant State is not a prerequisite to the maintenance of a suit by the United States against a State of the Union. In its criticism of the *Texas* case, Louisiana asserts (1) that the holding is contrary to a decision said to have been reached by the Constitutional Convention to withhold the consent of the States to be sued by the Federal Government; (2) that the *Texas* case was decided without precedent and was, in fact, contrary to earlier decisions of this Court; and (3) that the reasoning of the *Texas* case leads to the conclusion that, if the States in adopting the Constitution thereby consented to suit by the general government, it follows that the United States also consented to be sued by the States, and to this extent the *Texas* case has been overruled by the

decision of this Court in *Kansas* v. *United States*, 204 U. S. 331.

The case of *United States* v. *Texas* was an original suit brought by the United States in this Court to obtain an adjudication with respect to the ownership of certain territory situated between the States of Texas and what was then the Indian Territory. The relief sought was a determination of the true boundary line between the United States and the State of Texas within the disputed area. The State demurred to the complaint, urging as the principal ground therefor that a suit brought by the United States against one of the States of the Union is not within the contemplation of the Constitution.[2] The question was thoroughly briefed and argued on behalf of the State of Texas, and many of the matters mentioned by counsel were the same as those now urged by the State of Louisiana, particularly the considerations set forth in the dissenting opinions of Mr. Justice Curtis and Mr. Justice Campbell in *Florida* v. *Georgia*, 17 How. 478, at 496–513 and 513–523, respectively, from which counsel for Texas quoted at length. See 143 U. S. at 627–629.

The Court, in a clear and comprehensive opin-

[2] In support of its demurrer the State of Texas also contended (1) that the question was political in nature and not susceptible of judicial determination, and (2) that this Court, sitting as a court of equity, had no jurisdiction, since the cause of action asserted was legal and not equitable in nature. Both of these contentions were considered and disposed of by the Court.

ion by Mr. Justice Harlan, held that it had jurisdiction to entertain the proceeding sought to be brought by the United States and that the specific consent of the defendant State was not required, since the several States, in subscribing to the provisions of the Constitution, had, in effect, consented to the institution of such suits against them by the United States. The language in which the Court expressed its conclusions in respect to this question is as follows (143 U. S. at 646):

> The States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend to *all* cases arising under the Constitution, laws and treaties of the United States, without regard to the character of the parties, (excluding, of course, suits against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States,) and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases, "in which a State shall be party," without excluding those in which the United States may be the opposite party. *The exercise, therefore, by this court, of such original jurisdiction* in a suit brought by one State against another to determine the boundary line between them, or *in a suit brought by the United States against a State* to determine the

> boundary between a Territory of the United States and that State, *so far from infringing,* in either case, *upon the sovereignty, is with the consent of the State sued.* Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other States. [Italics supplied.]



As above indicated, the *Texas* case involved a boundary dispute, but the jurisdiction there sustained has been exercised by this Court in a number of other proceedings brought by the United States against various States of the Union for the resolution of a variety of controversies.[3] Moreover, the decision has on numerous occasions been

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[3] These cases and the relief sought therein are as follows: *United States* v. *Michigan*, 190 U. S. 379 (accounting as to sales of lands); *United States* v. *Oklahoma*, 261 U. S. 253 (priority of claim to assets of liquidating bank); *United States* v. *Minnesota*, 270 U. S. 181 (cancellation of swampland patents); *United States* v. *Utah*, 283 U. S. 64 (quieting of title to bed of river); *United States* v. *Oregon*, 295 U. S. 1 (quieting of title to bed of nonnavigable lake); *United States* v. *Arizona*, 295 U. S. 174 (injunction against interference with construction of Government dam); *United States* v. *West Virginia*, 295 U. S. 463 (injunction against construction of dam under State authority); *United States* v. *Alabama*, 313 U. S. 274 (removal of State real property tax liens); *United States* v. *Louisiana*, 318 U. S. 743 (perpetuation of testimony); *United States* v. *Wyoming*, 331 U. S. 440 (quieting of title and recovery of damages); *United States* v. *California*, 332 U. S. 19 (declaration of rights in lands underlying Pacific Ocean). In addition the United States was intervener in *Oklahoma* v. *Texas*, 252 U. S. 372 (boundary dispute) and in *Nebraska* v. *Wyoming*, 325 U. S. 589 (dispute as to water rights in North Platte River).

cited with approval in connection with the Court's recognition of its jurisdiction over such proceedings. See *United States* v. *Michigan*, 190 U. S. 379, 396; *United States* v. *Minnesota*, 270 U. S. 181, 195; *United States* v. *West Virginia*, 295 U. S. 463, 470; *United States* v. *Wyoming*, 331 U. S. 440, 442. Also of significance in this connection are the remarks of Mr. Chief Justice Hughes in *Monaco* v. *Mississippi*, 292 U. S. 313, where, in his discussion of the various aspects of State immunity from suit in the light of the provisions of Article III, Section 2, there appears the following (pages 328–329):

> 1. The establishment of a permanent tribunal with adequate authority to determine controversies between the States, in place of an inadequate scheme of arbitration, was essential to the peace of the Union. The Federalist, No. 80; Story on the Constitution, § 1679. With respect to such controversies, the States by the adoption of the Constitution, acting "in their highest sovereign capacity, in the convention of the people," waived their exemption from judicial power. The jurisdiction of this Court over the parties in such cases was thus established "by their own consent and delegated authority" as a necessary feature of the formation of a more perfect Union. * * *
>
> 2. Upon a similar basis rests the jurisdiction of this Court of a suit by the United States against a State, albeit without the

> consent of the latter. While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan. * * * Without such a provision, as this Court said in *United States* v. *Texas, supra,* "the permanence of the Union might be endangered."

Louisiana suggests as a reason for overruling *United States* v. *Texas* (Objections to Motion, p. 7) that the decision therein is contrary to the precedent established by this Court in *Florida* v. *Georgia,* 17 How. 478. This suggestion is clearly without merit. In *Florida* v. *Georgia,* which involved a boundary dispute between those States, the Attorney General of the United States was granted leave to appear, offer evidence and be heard on the argument in the proceeding, without making the United States a party to the litigation. However, there is nothing in the case which holds that the United States could not have been made a party.[4] The Attorney General expressly stated that he did not desire to make the United States a party to the proceeding[5] (17 How. at 482–483), and the Court specifically found that it was not necessary to examine or decide that question. 17 How. at 493.

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[4] Cf. *Oklahoma* v. *Texas,* 252 U. S. 372; *Nebraska* v. *Wyoming,* 325 U. S. 589.

[5] The apparent reason for this was the possibility that the United States might become a party defendant without an Act of Congress to authorize it. See 17 How. at 493.

It is clear, therefore, that the decision in *Florida* v. *Georgia* did not, as Louisiana asserts, provide a "positive precedent against the taking of jurisdiction" in *United States* v. *Texas*. The remarks of the Court from which Louisiana quotes at length are, as indicated above, *supra*, p. 4, taken from the dissenting opinions in *Florida* v. *Georgia;* they did not constitute the ruling of the Court, and, of course, did not serve as a controlling precedent.

On the other hand, the Court did have before it and fresh in its memory the consideration given to this question in *United States* v. *North Carolina,* 136 U. S. 211, decided by substantially the same Court on May 19, 1890, less than two years prior to the decision in the *Texas* case. Louisiana seeks to emphasize the statement of the Court in *United States* v. *Texas* in regard to the *North Carolina* case that "no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject." 143 U. S. at 642. However, it is most significant that immediately following this statement, the Court also said (*Ibid.*):

> But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a State.

It is obvious, therefore, that the Court considered the question of its jurisdiction in the case of

United States v. *North Carolina*, on its own motion.[6] See discussion of this problem by Dr. James Brown Scott, in *Judicial Settlement of Controversies between States of the American Union* (1919), p. 254.

There is also no basis for Louisiana's contention that *United States* v. *Texas* has been overruled in part by *Kansas* v. *United States*, 204 U. S. 331, where it was held that a State may not sue the United States without its consent. There is nothing in the *Texas* case which suggests the contrary. To be sure, the Court observed in the *Texas* case that the Federal and State governments are "both subject to the supreme law of the land" (143 U. S. at 646), but it does not follow from this that the respective governments occupy the same position insofar as immunity to suit from the other may be concerned. Indeed, a suit between the United States and a State "is not a controversy between equals." See *Sanitary District* v. *United States*, 266 U. S. 405, 425. In any event, however, the decision in *Kansas* v. *United States* did not, even by indirection, overrule *United States* v. *Texas*, in whole or in part. On the contrary, in the *Kansas* case the Court referred to and quoted from the *Texas* case with approval, and stated its conclusion as follows (204 U. S. at 342):

> It does not follow that because a State may be sued by the United States without its

[6] Cf. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 382.

consent, therefore the United States may be sued by a State without its consent. Public policy forbids that conclusion.

See also *United States* v. *Louisiana*, 123 U. S. 32, 36–37; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 386.

The foregoing clearly demonstrates, we submit, that the decision in *United States* v. *Texas*, with its comprehensive and well-reasoned analysis of the question therein decided, is not in conflict with any earlier decision of this Court, nor has it been overruled, even in part, by any subsequent decision. The decision is correct and should be adhered to in the present instance.

II

CONTEMPORANEOUS INTERPRETATION OF JUDICIARY ARTICLE

In further support of its contention that the Court has no jurisdiction over a suit brought by the United States against a State without its consent, Louisiana argues that such a proceeding is not within the purview of Article III of the Constitution, as evidenced both by the language of that Article and the decisions reached in respect thereto while the Article was being considered by the Constitutional Convention.

The matters to which Louisiana refers occurred at various times during the consideration by the Convention of the draft of a Constitution submitted by Mr. Rutledge on behalf of the Committee of Detail on August 6, 1787. (2 Madison

Papers (1840 ed.), 1226; 5 Elliot's Debates, 376; H. Doc. 398, 69th Cong., 1st Sess., 471.) On August 20, Mr. Pinckney submitted to the Convention several propositions which were referred to the Committee of Detail. One of these propositions was as follows (3 Madison Papers (1840 ed.), 1366; 5 Elliot's Debates, 446; H. Doc. 398, 69th Cong., 1st Sess., 572):

> "The jurisdiction of the Supreme Court shall be extended to all controversies between the United States and an individual State; or the United States and the citizens of an individual State.

On August 22, Mr. Rutledge, a member of the Committee to which Mr. Pinckney's propositions had been referred, submitted a report recommending certain additions to the report before the Convention, among them being the following insertion to be made in Article XI, Section 3,[1] which related

[1] The text of Article XI, Section 3, as reported on August 6, 1787, was as follows (2 Madison Papers (1840 ed.) 1238; 5 Elliot's Debates, 380; H. Doc. 398, 69th Cong., 1st Sess., 479):

"Sect. 3. The jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting ambassadors, other public ministers and consuls; to the trial of impeachments of officers of the United States; to all cases of admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard territory or jurisdiction); between a state and citizens of another State; between citizens of different States; and between a state, or the citizens thereof, and foreign states, citizens or subjects. In cases of impeachment, cases affecting ambassadors, other

to the jurisdiction of the Supreme Court (3 Madison Papers (1840 ed.), 1399; 5 Elliot's Debates, 462; H. Doc. 398, 69th Cong., 1st Sess., 596):

> Between the fourth and fifth lines of the third section of the eleventh article, after the word "controversies," insert "between the United States and an individual State, or the United States and an individual person."

When the Convention, on August 27, took up the consideration of Article XI, and the various recommendations relative thereto, no action was taken with respect to the above-quoted proposition of Mr. Pinckney or the similar addition proposed by the Committee. From this negative circumstance Louisiana attempts to conclude that the Constitutional Convention affirmatively refused to confer jurisdiction on this Court over a suit brought by the United States against a State.

It is submitted that the inference which Louisiana seeks to draw in this regard cannot be sustained. It is true that the specific provision recommended by the Committee of Detail was not adopted, nor was a similar proposal considered

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public ministers and consuls, and those in which a State shall be party, this jurisdiction shall be original. In all the other cases beforementioned, it shall be appellate, with such exceptions, and under such regulations, as the Legislature shall make. The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such inferior courts, as it shall constitute from time to time."

on August 30, which would have provided that claims of the United States, and of the individual States, to territory "shall be examined into, and decided upon, by the Supreme Court of the United States."[8] 3 Madison Papers (1840 ed.) 1465–1466; 5 Elliot's Debates, 496–497; H. Doc. 398, 69th Cong., 1st Sess., 645. However, the failure of the Convention to adopt these recommendations[9] does not mean that the framers of the Constitution did not intend to and did not actually provide for the adjudication of suits brought by the United States against a State.

When all the circumstances surrounding the action of the Convention in respect to the judiciary article are taken into consideration, the reason for its decision in respect to the above-mentioned proposals is obvious. *The adoption of the provisions as proposed was not necessary.* The draft of the article submitted to the Convention by the Committee of Detail contained no

[8] It is this latter proposition to which Mr. Justice Campbell was apparently referring in his dissent in *Florida* v. *Georgia*, when he observed that one such proposal before the Convention was "peremptorily rejected." 17 How. at 521.

[9] There had also been submitted to the Convention, in the Patterson plan, a recommendation that "provision ought to be made for hearing and deciding upon all disputes arising between the United States and an individual state, respecting territory," but such provision was not included in the draft submitted by the Committee of Detail. This proposal, which does not appear in the version of Patterson's plan given by Madison (2 Madison Papers (1840 ed.), 862–867), is set forth in the Journal of the Convention. 1 Elliot's Debates, 177; H. Doc. 398, 69th Cong., 1st Sess., 769, 973.

provision whatever with respect to suits brought by the United States, and on August 27, when the article was being considered, Mr. Madison and Mr. Gouverneur Morris moved to insert, after the word "controversies," the words "to which the United States shall be a party;" which was agreed to. 2 Madison Papers (1840 ed.), 1438; 5 Elliot's Debates, 482; H. Doc. 398, 69th Cong., 1st Sess., 624. This, it is submitted, was regarded by the members of the Convention as an appropriate substitute for the recommendations of the Committee in regard to suits between the United States and an individual State and suits between the United States and an individual person.[10] Indeed, any doubt which might exist on this point would seem to be removed by the discussion which took place on August 30, when the Convention was considering certain proposed additions to Article XVII of the draft. The pertinent portions of the discussion are as follows (3 Madison Papers (1840 ed.), 1465–1466; 5 Elliot's Debates, 496–497; H. Doc. 398, 69th Cong., 1st Sess., 644–645):

> Mr. CARROLL withdrew his motion and moved the following:
>
> "Nothing in this Constitution shall be construed to alter the claims of the United States, or of the individual States, to the Western territory; but all such claims shall

[10] This view as to the effect of Madison's motion on August 27 is concurred in by Mr. Charles Warren. See *The Making of the Constitution* (1928), 536–537.

be examined into, and decided upon, by the Supreme Court of the United States."

Mr. GOUVERNEUR MORRIS moved to postpone this, in order to take up the following:

"The Legislature shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States; and nothing in this Constitution contained, shall be so construed as to prejudice any claims, either of the United States or of any particular State." The postponement agreed to, *nem. con.*

Mr. L. MARTIN moved to amend the proposition of Mr. GOUVERNEUR MORRIS, by adding: "But all such claims may be examined into, and decided upon, by the Supreme Court of the United States."

Mr. GOUVERNEUR MORRIS. *This is unnecessary, as all suits to which the United States are parties are already to be decided by the Supreme Court.*

Mr. L. MARTIN. It is proper, in order to remove all doubts on this point.

On the question on Mr. L. MARTIN'S amendatory motion—

New Jersey, Maryland, aye—2; New Hampshire, Massachusetts, Connecticut, Pennsylvania, Delaware, Virginia, no—6. States not further called, the negatives being sufficient, and the point being given up. [Italics supplied.]

Further evidence of the intention of the members of the Convention to extend the judicial

power[11] to suits brought by the United States against a State is to be found in a statement made on August 27 while the Convention was considering a motion to amend Article XI, Section 2, of the draft to provide that members of the judiciary might be removed from office by the Executive on the application of the Senate and House of Representatives. In the course of the debate on the motion, Mr. Rutledge declared (3 Madison Papers (1840 ed.), 1436; 5 Elliot's Debates, 481; H. Doc. 398, 69th Cong., 1st Sess., 623):

> If the Supreme Court is to judge between the United States and particular States, this alone is an insuperable objection to the motion.[12]

Finally, the fact that the framers of the Constitution envisioned the necessity for suits by the United States against a State is confirmed by certain remarks subsequently made by one of the members of the Convention. In explaining Article III of the Constitution, as finally drafted, before the Pennsylvania Convention for the

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[11] On August 27, 1787, on the motion of Mr. Madison and Mr. Gouverneur Morris, the words "the Judicial power" were substituted for the words "the jurisdiction of the Supreme Court" in the judiciary article. 3 Madison Papers (1840 ed.), 1439; 5 Elliot's Debates, 483; H. Doc. 398, 69th Cong., 1st Sess., 625.

[12] Mr. Charles Warren appropriately observes that in this remark Rutledge was anticipating the decision of this Court in *United States* v. *Texas*. See *The Making of the Constitution* (1928), 532.

adoption thereof, the Honorable James Wilson, later a member of this Court, made the following statement (2 Elliot's Debates, 490):

> The next is, *"to controversies to which the United States shall be a party."* Now, I apprehend it is something very incongruous, that, because the United States are a party, it should be urged, as an objection, that their judges ought not to decide, when the universal practice of all nations has, and unavoidably must have, admitted of this power. But, say the gentlemen, the sovereignty of the states is destroyed, if they should be engaged in a controversy with the United States, because a suiter in a court must acknowledge the jurisdiction of that court, and it is not the custom of sovereigns to suffer their names to be made use of in this manner. The answer is plain and easy: the government of each state ought to be subordinate to the government of the United States.

The above-quoted excerpts from the remarks of various members of the Constitutional Convention are, it is submitted, more than sufficient to establish that, in adopting the language of the judiciary article, the framers of the Constituion intended that the provisions thereof should embrace a suit brought by the United States against a State. In ratifying the Constitution, or in joining the Union on an equal footing with the original States, the several States have given their consent to such suits.

CONCLUSION

The jurisdiction of this Court to entertain this suit is clearly established by the provisions of Article III of the Constitution and the interpretations given thereto by this Court and the framers of the Constitution. The objections interposed by Louisiana are wholly without merit and cannot be sustained, either in theory or in fact.

The motion for leave to file the complaint should be granted.

Respectfully submitted.

TOM C. CLARK,
Attorney General.
PHILIP B. PERLMAN,
Solicitor General.
A. DEVITT VANECH,
Assistant Attorney General.
ARNOLD RAUM,
Special Assistant to the Attorney General.
ROBERT E. MULRONEY,
ROBERT M. VAUGHAN,
Attorneys.

MARCH 1949.

U. S. GOVERNMENT PRINTING OFFICE: 1949

In the Supreme Court of the United States

OCTOBER TERM, 1949

NO. 12, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA

MOTION FOR JUDGMENT

Comes now the United States, by its Attorney General and its Solicitor General, and moves the Court for judgment as prayed in the Complaint, in accordance with the Court's order of June 13, 1949, 337 U. S. 928. If the Court should desire to hear argument on the issues raised by the Complaint, the United States requests that the case be set for argument at an early date.

J. HOWARD MCGRATH,
Attorney General.

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER, 1949.

855803—49

STATEMENT WITH RESPECT TO MOTION

On December 21, 1948, the United States filed its motion for leave to file its complaint in this case. Normally, such leave would be granted as of course, as was done in *United States* v. *California*, 326 U. S. 688. Louisiana, however, asked for permission to oppose the motion, and this Court, by order of January 3, 1949 (335 U. S. 901), allowed the State two weeks within which to present any objections it might have "based upon jurisdictional grounds." Thereafter, on three successive dates (January 17, 1949, February 9, 1949, and May 5, 1949), the State filed documents with this Court in which it challenged the jurisdiction of the Court. It even sought, over the objections of the United States, to have the adjudication of this preliminary matter of jurisdiction postponed to the following October term, but the Court heard argument on the motion on May 9, 1949. Just one week later, on May 16, 1949, the Court granted the motion of the United States for leave to file, and ordered that process issue, returnable September 1, 1949. 337 U. S. 902. This order was a ruling on the jurisdiction of the Court. Louisiana, however, filed a petition for rehearing on May 31, 1949, in which it indicated that it still regarded the question of jurisdiction as open. In an order

dated June 13, 1949, the Court denied the petition for hearing in terms which left no room for ambiguity (337 U. S. 928):

> The petition for rehearing is denied. The objections to the granting of leave to file the complaint are overruled and the State of Louisiana is directed to answer the allegations of the complaint within the time specified in the subpoena, otherwise the plaintiff may proceed *ex parte*.

Now, instead of answering the "allegations of the complaint," Louisiana has again filed a motion challenging the jurisdiction of the Court and attempting to raise other objections of an insubstantial character, calculated to delay the adjudication of this case on the merits.

Such tactics are particularly contrary to the public interest here, since the case on the merits is squarely governed by *United States* v. *California*, 332 U. S. 19.

In the circumstances, we think that the Court could properly enter judgment forthwith on the Complaint. However, if the Court should desire argument, the case should be set down for argument on the merits at an early date.

Respectfully submitted,

J. HOWARD MCGRATH,
Attorney General.

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER, 1949.

U. S. GOVERNMENT PRINTING OFFICE: 1949

In the Supreme Court of the United States

OCTOBER TERM, 1949

NO. 12, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA

MOTION FOR JUDGMENT

Comes now the United States of America, by its Attorney General and its Solicitor General, and, reserving the right to trial on any issues of fact which cannot be resolved by judicial notice, moves the Court for judgment as prayed in the Complaint, for the reason that the purported defenses set forth in the Answer filed herein by the State of Louisiana are insufficient in law.

J. HOWARD MCGRATH,
Attorney General.

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 1949.

864163—49

STATEMENT WITH RESPECT TO MOTION

The State of Louisiana has filed an Answer consisting of four purported defenses, two of which appear to be directed to the allegations of the Complaint and two of which are described as Affirmative Defenses:

> As a *First Defense,* the State suggests that there is no case or controversy between the parties, that the Court has no jurisdiction in equity over the matter, and that the Complaint fails to state a claim upon which relief can be granted.
>
> As a *Second Defense,* it is admitted that the State claims to be the owner in fee simple of the lands described in the Complaint; that it has, by general law, authorized the leasing of said lands; that it has negotiated and executed leases for the development of petroleum products located therein; that wells which are producing petroleum substances have been drilled in such lands; and that neither the State nor any of its lessees has paid to the United States the value of such petroleum products or any royalties thereon. The State denies, however, that its claim of title and the activities of its lessees constitute an interference with the powers of the United States over the area in question.
>
> As a *First Affirmative Defense,* it is alleged that by virtue of its admission to the Union by the Act of April 8, 1812, 2 Stat. 701, on an equal footing with the original states, the State of Louisiana be-

came vested with and now holds fee simple title to all lands under all navigable waters within its territorial limits.

As a *Second Affirmative Defense,* Louisiana presents what appears to be an allegation of adverse possession with respect to the lands, minerals and other things underlying the Gulf of Mexico within the area described in the Complaint.

There is nothing in the Answer filed by Louisiana which suggests any dispute between the parties as to the facts which are requisite to a determination of the basic issues in this case and which are not subject to judicial notice. Indeed, the admissions made by the State in its Second Defense bring the litigation squarely within the framework of the similar case of *United States* v. *California,* at the time this Court rendered its opinion of June 23, 1947 (332 U. S. 19), and its decree of October 27, 1947 (332 U. S. 804). The controversy here, like that in the *California* case, involves "several thousand square miles of land under the ocean" and "the conflicting claims of federal and state officials as to which government, state or federal has a superior right to take or authorize the taking of the vast quantities of oil and gas underneath that land * * *" (332 U. S. 24–25).

In the Complaint herein, the United States has asserted its rights with respect to the lands and minerals underlying the Gulf of Mexico ad-

jacent to Louisiana and has alleged that the State and its lessees have been and are trespassing upon the area in violation of the rights of the United States. The State, in its Answer, has admitted the activities described in the Complaint, but has alleged that such activities are not in violation of the rights of the United States. This presents a question of law which may be decided by the Court on the basis of the pleadings.

Louisiana has also presented to the Court a motion for trial by jury, suggesting that this suit is an action at law and that the State, as the representative of its citizens, is entitled to a trial by jury as provided in the Seventh Amendment to the Constitution and in 28 U. S. C., sec. 1872. This motion by the State is clearly without merit and should be summarily denied. There are other reasons why Louisiana is not entitled to such a trial in a proceeding of this character, but it is sufficient to point out that this suit and the relief sought herein are equitable in nature. The Seventh Amendment applies by its terms only to "Suits at common law."

As above indicated, the Answer filed by Louisiana presents no conflict as to the relevant facts in this controversy and, in our opinion, no legal question which was not decided adversely to the State's position in the decision of the Court in *United States* v. *California*, 332 U. S. 19. In the

circumstances, therefore, we suggest that the Court may appropriately enter judgment forthwith on the pleadings; otherwise, the case should be set for argument on the Motion for Judgment hereto annexed.

Respectfully submitted,

J. HOWARD MCGRATH,
Attorney General.

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 1949.

U. S. GOVERNMENT PRINTING OFFICE 1949

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 12, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES IN SUPPORT OF MOTION FOR JUDGMENT

JURISDICTION

The jurisdiction of this Court rests upon Article III, sec. 2, cl. 2, of the Constitution.

QUESTION PRESENTED

Whether, as against the State of Louisiana, the United States has paramount rights in, dominion over, and ownership of the lands, minerals and other things underlying that portion of the Gulf of Mexico which is seaward of the ordinary low-water mark along the coast of Louisiana and outside of the inland waters of the State.

STATEMENT

This suit was instituted for the purpose of establishing the rights of the United States, as against the State of Louisiana, in that portion of the bed of the Gulf of Mexico adjacent to the coast of the State of Louisiana which lies outside the inland waters of the State and which extends seaward for twenty-seven marine miles from the low-water mark on the open coast.[1] The United States filed its motion for leave to file the complaint on December 21, 1948.

Louisiana opposed the Government's motion for leave to file its complaint on the ground that the State could not be sued without its consent. This Court overruled the State's objection and granted leave to file the complaint. 337 U. S. 902. It was ordered that process issue, returnable September 1, 1949. The State's petition for rehearing was denied on June 13, 1949, and it was "directed to answer the allegations of the complaint within the time specified in the subpoena, otherwise the plaintiff may proceed *ex parte*." 337 U. S. 928. Instead of filing an answer to the complaint on the return date, Louisiana filed (i) a "demurrer or motion to dismiss on jurisdictional grounds," and (ii) "conditional motions" to dis-

[1] No claim is here made to any lands under inland waters or to so-called tidelands, *i. e.*, those lying between the ordinary high- and low-water marks.

miss for lack of indispensable parties and for a more definite statement and a bill of particulars. The United States thereupon moved for judgment as prayed in the complaint. On October 10, 1949, the Court denied both sets of motions, and Louisiana was allowed thirty days from October 10 within which to file an answer to the complaint. The answer was filed on November 9, 1949. On November 29, 1949, the United States moved for judgment on the ground that the State's purported defenses were insufficient in law. On December 5, 1949, the Court ordered the case set down for argument on that motion. Supreme Court Journal, 1949 Term, p. 85.

1. It is alleged in the complaint that the United States owns in fee simple, or possesses paramount rights in, and full dominion and power over, these submerged lands; that Louisiana claims some right, title or interest in these lands and has by statute (Act 30 of 1915 (Louisiana Acts, 1915, p. 62), as superseded by Act 93 of 1936 (Louisiana Acts, 1936, p. 276, as amended) undertaken to provide for the leasing of these lands for the exploitation of petroleum, gas and other mineral deposits; that under that law the State has executed leases to various persons and corporations; and that such lessees have drilled wells upon the lands, producing and converting to their own uses quantities of petroleum, gas and other hydro-

carbon substances for which they have paid to the State substantial sums of money (pp. 4–6). The Government asks for a decree declaring the rights of the United States as against the State of Louisiana in the area in question and enjoining the State and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States, and requiring the State to account to the United States for money derived by it from the area subsequent to June 23, 1947 (p. 7).[2]

Louisiana's answer consists of four purported defenses, two of which appear to be directed to the allegations of the complaint, and two of which are described as affirmative defenses:

As a *First Defense,* the State suggests that there is no case or controversy between the parties, that the Court has no jurisdiction in equity over the matter, and that the complaint fails to state a claim upon which relief can be granted.

As a *Second Defense,* it is admitted that the State claims to be the owner in fee simple of the lands described in the complaint; that it has, by general law, authorized the leasing of said lands; that it has negotiated and executed leases for the development of petroleum products located

[2] June 23, 1947, is the date of this Court's decision in *United States v. California*, 332 U. S. 19, declaring the paramount rights of the United States in lands underlying the open sea below low-water mark.

therein; that wells which are producing petroleum substances have been drilled in such lands; and that neither the State nor any of its lessees has paid to the United States the value of such petroleum products or any royalties thereon. The State denies, however, that its claim of title and the activities of its lessees constitute an interference with the powers of the United States over the area in question.

As a *First Affirmative Defense,* it is alleged that by virtue of its admission to the Union by the Act of April 8, 1812, 2 Stat. 701, on an equal footing with the original states, the State of Louisiana became vested with and now holds fee simple title to all lands under all navigable waters within its territorial limits.

As a *Second Affirmative Defense,* Louisiana presents what appears to be an allegation of adverse possession with respect to the lands, minerals and other things underlying the Gulf of Mexico within the area described in the complaint.

2. The basic historical facts in the background of the controversy are as follows: The territory out of which the State of Louisiana was created was purchased by the United States from France under the Treaty of April 30, 1803, 8 Stat. 200. The only proprietary rights excepted from the transfer were those belonging to inhabitants of the ceded territory, none of which is involved

here (Article III).[1] In consideration of the cession the United States undertook to pay France the sum of $15,000,000.00 (8 Stat. 206, 208). By the Act of March 26, 1804, 2 Stat. 283, the territory thus acquired was divided into two territories, the area south of the Mississippi Territory, and south of the thirty-third degree of north latitude west of the Mississippi River, being designated as the Territory of Orleans. The Act also made provision for the temporary government of the territory thus constituted.

By the Enabling Act of February 20, 1811, 2 Stat. 641 (App. *infra,* pp. 18–21), the inhabitants of the Territory of Orleans, within certain boundaries, were authorized to form a constitution and state government, and by the Act of April 8, 1812, 2 Stat. 701, 703 (App. *infra,* pp. 22–25), the State of Louisiana was admitted to the Union "on an equal footing with the original states, in all respects whatever."

The original boundaries of the State at the time of its admission to the Union are described in almost identical language in the Enabling Act

[1] Article III provided (8 Stat. at 202):

"The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

(2 Stat. 641), the Act of Admission (2 Stat. 701), and the State Constitution of 1812 (Dart, Louisiana Constitutions (1932), p. 499 (App. *infra*, pp. 25–26)), and so far as the southern boundary is concerned, the State is described in all three as "bounded by the said gulf [of Mexico] * * * including all islands within three leagues of the coast."[4]

Louisiana did not by statute undertake to declare a different southern boundary for 126 years,

[4] It may be noted that the present eastern boundary of the State differs from that prescribed at the time of the State's admission. By the Act of April 14, 1812, 2 Stat. 708, the eastern boundary, south of the thirty-first degree of north latitude was extended eastward to the Pearl River. The exact location of this boundary between the mouth of the Pearl River (which empties into Lake Borgne) and the Gulf proper was not finally resolved until this Court's decree in *Louisiana* v. *Mississippi*, 202 U. S. 58, in which the Court determined that the eastern boundary passed between Cat Island and Isle à Pitre to the Gulf of Mexico. The western boundary was fixed in the Enabling Act, the Act of Admission, and the State Constitution of 1812 as the middle of the Sabine River.

The words "including all islands within three leagues of the coast" in Louisiana's original boundary description do not mean that all water areas within that distance were within the State's boundaries, and there is nothing in the case of *Louisiana* v. *Mississippi*, 202 U. S. 1, which so holds. As above indicated, that litigation involved a dispute as to the location of the boundary between those states through the *inland* waters of Lake Borgne and the Mississippi Sound. Indeed, the Court expressly stated that "questions as to the breadth of the maritime belt" were not before it in that case (202 U. S. at 52). See *United States* v. *California*, 332 U. S. 19, 37.

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and as recently as 1934 that boundary was recognized by the State as being the Gulf of Mexico (Opinions and Reports of the Attorney General of Louisiana, 1934–1936, p. 685). However, by Act 55 of 1938, approved June 30, 1938 (Louisiana Acts, 1938, p. 169; App. *infra*, pp. 26–29) the State declared its southern boundary to be twenty-seven marine miles from the shore line.[5]

SUMMARY OF ARGUMENT

I

The United States has, as against Louisiana, paramount rights in the marginal sea, and as an incident thereto complete dominion over the resources of the bed of that sea. That was the holding of this Court, as against California, in *United States* v. *California*, 332 U. S. 19. Louisiana, like California, was admitted to the Union "on an equal footing with the original states," and is in exactly the same position as to the marginal sea off its shore. Louisiana, in claiming the bed of that sea and its resources, is simply asserting, without attempting to show that it stands on any different basis, that it is on a better footing than

[5] No question is here raised as to the *boundary* of Louisiana, although a very serious question may exist as to whether the State may have a boundary that is farther seaward than the 3-mile limit. See *infra*, pp. 16–17. The issue here relates to rights in the submerged lands seaward of the ordinary low water mark, whether they be within or without the State's boundary.

California. So far as rights in the marginal sea are concerned, Louisiana's story is no more favorable to its claim than that of California. The territories from which both States were formed were ceded to the United States by other countries; both were federal territory before their admission to the Union; the pertinent terms of their admission were identical; and their post-admission histories have been similar. If anything, Louisiana is in a worse position than California because until 1938 its boundary ended at the Gulf, while California has from its beginning put its boundary three English miles out to sea.

II

Louisiana has recently sought to extend its boundary, and its title to the submerged offshore lands, to twenty-seven miles from the coast. But it is clear that, regardless of the validity of the attempted extension of the State's *boundary*, the United States has, as against the State, at least the same paramount rights in, and dominion over, the lands underlying the Gulf of Mexico outside the marginal sea, as it has with respect to that belt.

Texas has also recently passed comparable boundary-extension statutes, and the Court is respectfully referred to Point III of the Government's brief in No. 13, Original, for a discussion of the issues raised by this Texas and Louisiana ~~of the issues raised by this Texas and Louisiana~~ legislation.

ARGUMENT

I

UNITED STATES v. *CALIFORNIA* SQUARELY GOVERNS THIS CASE

Louisiana presents no substantial defenses which were not raised by California, and *United States* v. *California,* 332 U. S. 19, squarely rules the present suit. There, California asserted ownership of submerged lands and the resources thereof lying between low-water mark on its coast and a boundary claimed by the State as three English miles from shore. Here, as there, "the point of difference is as to who owns, or has paramount rights in and power over * * * land under the ocean off the coast" and "involves the conflicting claims * * * as to which government, state or federal, has a superior right to take or authorize the taking of the vast quantities of oil and gas underneath that land" (332 U. S. at pp. 24–25).

A. In resolving the California dispute, the Court held that (a) the thirteen original colonies did not acquire ownership of the marginal sea, or the underlying soil, and the "equal footing" clause of her admission statute gave California no greater rights (332 U. S. at 30–33, 38–39) (see also *Toomer* v. *Witsell,* 334 U. S. 385, 402); (b) the United States has asserted and has acquired national dominion and control over the

marginal sea (332 U. S. at 33–34); (c) protection of the three-mile belt has been and is a function of national external sovereignty, because of the belt's close relationship to national defense and the conduct of foreign affairs, which are federal powers and responsibilities (332 U. S. at 34–36); and (d) for these reasons, a State may exercise local police power functions in the part of the marginal sea properly within its declared boundaries, but the United States has paramount rights in and power over the area, including full dominion over the resources of the underlying soil (332 U. S. at 36–37, 38–39).

These principles are universal in their formulation and application, not limited to the test suit against California and its individual facts, and they control the cases of the original thirteen and all the remaining States—unless a particular State can show special reason for different treatment.

B. Louisiana makes no real attempt to differentiate its case from that of California, and it could not well do so, since the pre-admission history of both States, the circumstances of their admission, and their post-admission history, are substantially the same. Both States were formed out of federal territory previously acquired from a foreign country (Mexico in California's case and France in Louisiana's); and, in both cases, the treaty of cession saved only the title to property

which was privately owned (*supra*, pp. 5–6). It is not, and cannot be, denied that, in both instances, after the territory became American and before the new States were admitted, whatever rights or claims there then were in the lands beneath the marginal sea belonged solely to the United States.

In all respects pertinent to this case, except one, the California and Louisiana admission or enabling statutes had similar provisions.[7] Both contained the usual "equal footing" clause:

---

[6] In the case of Louisiana, Article II of the Treaty of 1803 with France provided, in part (8 Stat. at 202):

"In the cession made by the preceding article are included the adjacent islands belonging to Louisiana, all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private property. * * *"

[7] A preliminary enabling act (Act of February 20, 1811, 2 Stat. 641, *infra*, p. 18–21), authorized the inhabitants of Louisiana to form a State government and adopt a constitution; this was done, and after approval of the constitution by Congress, the new State was admitted by the Act of April 8, 1812, 2 Stat. 701, *infra*, p. 22–25. In California's case, the proposed State constitution was drawn up, in 1849, without authorization by Congress, but with the support of the Governor appointed by the Secretary of War; thereafter the constitution was submitted to Congress, and the new State was admitted by the Act of September 9, 1850, 9 Stat. 452. See Brief for the United States, Oct. Term 1946, No. 12, Original, pp. 60–62. There is no suggestion that anything turns on this procedural difference in the way California and Louisiana joined the Union.

Similarly, nothing can turn on the fact that Louisiana was an organized territory prior to its admission, and California an unorganized territory.

"That the said state shall be one, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever. * * *" (2 Stat. at 703, *infra*, p. 23;[8] 9 Stat. 452 (California statute)). There are no other relevant clauses, except that, in both cases, the new State was required to agree to disclaim all right, title or interest in the public lands within the State. The Louisiana term of admission provides for an irrevocable ordinance

> that the people inhabiting the said territory do agree and declare, that they for ever disclaim all right or title to the waste or unappropriated lands, lying within the said territory; and that the same shall be and remain at the sole and entire disposition of the United States. * * * [2 Stat. at 642, *infra*, p. 20].

The California statute spoke of the "public lands within its limits." 9 Stat. 452.

The one difference in admission terms—and it is unfavorable to Louisiana's claim—is that the boundaries of California, at the time of its admission, extended three English miles into the sea,

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[8] The Louisiana enabling Act of February 20, 1811, provided for the admission of the new State "upon the *same* footing with the original states" (italics supplied) (2 Stat. at 643, *infra*, p. 21), but its title referred to the "admission of such state into the Union, on an *equal* footing with the original states * * *" (italics supplied) (2 Stat. 641, *infra*, p. 18).

while Louisiana's stated boundary, at the time of its admission and for over a century thereafter, apparently ended at the Gulf of Mexico. See *supra*, pp. 6–8.

There is likewise no material difference, favorable to Louisiana, in the post-admission history of the two States, with respect to the marginal sea, and Louisiana's answer alleges no effective difference.

C. In these circumstances, there can hardly be any denial that the *California* decision squarely governs. Louisiana's "equal footing" clause did not endow it with any greater title or right to the submerged lands than that held by the original states or by California, and it is now settled that these States never acquired ownership of the marginal sea. *United States* v. *California*, 332 U. S. at 30–33, 38–39; *Toomer* v. *Witsell*, 334 U. S. 385, 402.[9] Unlike Texas, there is no other clause in its admission terms to which Louisiana points, and its prior history is the same as that of California.[10] And unlike California (332 U. S. at 39), Louisiana's answer does not even allege that the Fed-

[9] Louisiana's First Affirmative Defense apparently rests wholly on the "equal footing" clause, in direct conflict with this Court's two recent holdings.

[10] The decision in the *California* case was not based on the "public lands" clause of the California admission act (*supra*, p. 13), and we do not find it necessary to contend that Louisiana gave up potential claims to offshore lands by virtue of the "waste or unappropriated lands" clause of her enabling statute (*supra*, p. 13).

eral Government's paramount right had been lost by reason of the post-admission conduct of its agents.[11] If that defense were raised here, it would, of course, be subject to precisely the same answer as the Court gave to California (332 U. S. at 39–40).

It must follow that Louisiana stands on no better footing than California, so far as the three-mile belt is concerned, and the United States is entitled to prevail under the holding in the earlier case.

II

THE UNITED STATES HAS, AS AGAINST LOUISIANA, AT LEAST THE SAME PARAMOUNT RIGHTS IN, AND DOMINION OVER, THE LANDS UNDERLYING THE GULF OF MEXICO OUTSIDE THE MARGINAL SEA, AS IT HAS WITH RESPECT TO THE MARGINAL SEA

The case does vary from that of California to this extent:—while California claimed a seaward boundary only three English miles from its shore line, and therefore asserted ownership of lands lying wholly within the marginal sea as recognized in international law and by the United

[11] The Second Affirmative Defense merely asserts that the State has long been in possession, without challenge, of the disputed area. This Defense appears to be one of adverse possession or prescription, though it is not so labeled, and, as such, must fall for the reasons given in the *California* decision, 332 U. S. at 39–40. See also Brief of the United States in Support of the Motion for Judgment in *United States* v. *Texas*, this Term, No. 13, Original, at pp. 63–65 (discussion of Texas' explicit defense of prescription).

States, Louisiana claims a boundary twenty-seven marine miles from its shore, and claims to own the submerged lands within those limits. *Supra*, p. 8. The Government's complaint asserts that the United States "was and now is the owner in fee simple of, or possessed of paramount rights in, and full dominion and power over, the lands, minerals, and other things underlying the Gulf of Mexico, lying seaward of the ordinary low-water mark on the coast of Louisiana and outside of the inland waters, *extending seaward twenty-seven marine miles* and bounded on the east and west, respectively, by the eastern and western boundaries of the State of Louisiana" (Complaint, par. II, italics supplied).

The State of Texas has also attempted to extend its boundaries beyond the marginal sea, and has also asserted ownership in the bed of the Gulf within the area so extended. In our Brief in Support of the Motion for Judgment in *United States of America* v. *State of Texas*, this Term, No. 13, Original, pp. 69–80, we discuss the effect of these boundary-extension statutes, and urge that, regardless of a State's constitutional power to extend its *boundaries*, the United States has, as against the State, at least the same paramount rights in, and dominion over, the lands beneath the ocean outside of the marginal sea, as it has with respect to that belt (pp. 69–72). Although such issues need not be determined in these

actions, we also point out the grave constitutional questions raised by the Texas and Louisiana boundary-extension statutes (pp. 72–75).

This discussion and argument in Point III of the *Texas* brief is equally applicable to the instant case, and we respectfully refer the Court to that brief for a consideration of the rights of the United States, as against Louisiana, in the area beyond the marginal sea which Louisiana now claims.

CONCLUSION

The motion for judgment should be granted.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
A. DEVITT VANECH,
Assistant Attorney General.
ARNOLD RAUM,
OSCAR H. DAVIS,
Special Assistants to the Attorney General.
ROBERT E. MULRONEY,
ROBERT M. VAUGHAN,
FREDERICK W. SMITH,
GEORGE S. SWARTH,
Attorneys.

FEBRUARY 1950.

APPENDIX

1. Act of February 20, 1811, 2 Stat. 641:

CHAP. XXI.—*An Act to enable the people of the Territory of Orleans to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original states, and for other purposes*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the territory or country ceded under the name of Louisiana, by the treaty made at Paris on the thirtieth day of April, one thousand eight hundred and three, between the United States and France, contained within the following limits, that is to say: beginning at the mouth of the river Sabine, thence by a line to be drawn along the middle of the said river, including all islands to the thirty-second degree of latitude; thence due north, to the northernmost part of the thirty-third degree of north latitude; thence along the said parallel of latitude to the river Mississippi; thence down the said river to the river Iberville; and from thence along the middle of the said river and lakes Maurepas and Pontchartrain, to the gulf of Mexico; thence bounded by the said gulf to the place of beginning; including all islands within three leagues of the coast, be, and they are hereby authorized to form for themselves a constitution and state government, and to assume such name as they may

deem proper, under the provisions and upon the conditions herein after mentioned.

SEC. 2. *And be it further enacted,* That all free white male citizens of the United States, who shall have arrived at the age of twenty-one years, and resided within the said territory, at least one year previous to the day of election, and shall have paid a territorial, county, district or parish tax: and all persons having in other respects the legal qualifications to vote for representatives in the general assembly of the said territory; be, and they are hereby authorized to choose representatives to form a convention, who shall be apportioned amongst the several counties, districts and parishes, within the said territory of Orleans, in such manner as the legislature of the said territory shall by law direct. The number of representatives shall not exceed sixty; and the elections for the representatives aforesaid shall take place on the third Monday in September next, and shall be conducted in the same manner as is now provided by the laws of the said territory for electing members for the House of Representatives.

SEC. 3. *And be it further enacted,* That the members of the convention, when duly elected, be, and they are hereby authorized to meet at the city of New Orleans, on the first Monday of November next, which convention, when met, shall first determine, by a majority of the whole number elected, whether it be expedient or not, at that time, to form a constitution and state government, for the people within the said territory, and if it be determined to be expedient, then the convention shall in like manner declare, in behalf of the people of the said territory, that it adopts the constitution of the United States; where-

upon the said convention shall be, and hereby is authorized to form a constitution and state government, for the people of the said territory: *Provided*, the constitution to be formed, in virtue of the authority herein given, shall be republican, and consistent with the constitution of the United States; that it shall contain the fundamental principles of civil and religious liberty; that it shall secure to the citizen the trial by jury in all criminal cases, and the privilege of the writ of *habeas corpus*, conformably to the provisions of the constitution of the United States; and that after the admission of the said territory of Orleans as a state into the Union, the laws which such state may pass shall be promulgated, and its records of every description shall be preserved, and its judicial and legislative written proceedings conducted, in the language in which the laws and the judicial and legislative written proceedings of the United States are now published and conducted: *And provided also*, that the said convention shall provide by an ordinance, irrevocable without the consent of the United States, that the people inhabitating the said territory do agree and declare, that they forever disclaim all right or title to the waste or unappropriated lands, lying within the said territory; and that the same shall be and remain at the sole and entire disposition of the United States; and, moreover, that each and every tract of land, sold by Congress, shall be and remain exempt from any tax, laid by the order or under the authority of the state, whether for state, county, township, parish or any other purpose whatever, for the term of five years from and after the respective days of the sales thereof; and that the lands, belonging to citizens of the United

States, residing without the said state, shall never be taxed higher than the lands belonging to persons residing therein; and that no taxes shall be imposed on lands the property of the United States; and that the river Mississippi and the navigable rivers and waters leading into the same or into the gulf of Mexico, shall be common highways and for ever free, as well to the inhabitants of the said state as to other citizens of the United States, without any tax, duty, impost or toll therefor, imposed by the said state.

SEC. 4. *And be it further enacted,* That in case the convention shall declare its assent, in behalf of the people of the said territory, to the adoption of the constitution of the United States, and shall form a constitution and state government for the people of the said territory of Orleans, the said convention, as soon thereafter as may be, is hereby required to cause to be transmitted to Congress the instrument, by which its assent to the constitution is thus given and declared, and also a true and attested copy of such constitution or frame of state government, as shall be formed and provided by said convention, and if the same shall not be disapproved by Congress, at their next session after the receipt thereof, the said state shall be admitted into the Union, upon the same footing with the original states.

SEC. 5. *And be it further enacted,* That five per centum of the net proceeds of the sales of the lands of the United States, after the first day of January, shall be applied to laying out and constructing public roads and levees in the said state, as the legislature thereof may direct.

Approved, February 20, 1811.

2. Act of April 8, 1812, 2 Stat. 701:

CHAP. L.—*An Act for the admission of the State of Louisiana into the Union, and to extend the laws of the United States to the said state*

Whereas, the representatives of the people of all that part of the territory or country ceded, under the name of "Louisiana," by the treaty made at Paris, on the thirtieth day of April, one thousand eight hundred and three, between the United States and France, contained within the following limits, that is to say: beginning at the mouth of the river Sabine; thence, by a line to be drawn along the middle of said river, including all islands to the thirty-second degree of latitude; thence, due north, to the northernmost part of the thirty-third degree of north latitude; thence, along the said parallel of latitude, to the river Mississippi; thence, down the said river, to the river Iberville; and from thence, along the middle of the said river, and lakes Maurepas and Ponchartrain, to the gulf of Mexico; thence, bounded by the said gulf, to the place of beginning, including all islands within three leagues of the coast; did, on the twenty-second day of January, one thousand eight hundred and twelve, form for themselves a constitution and state government, and give to the said state the name of the state of Louisiana, in pursuance of an act of Congress, entitled "An act to enable the people of the territory of Orleans to form a constitution and state government, and for the admission of the said state into the Union, on an equal footing with the original states, and for other purposes:" And the said constitution having been transmitted to Congress, and by them being hereby approved; therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said state shall be one, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever, by the name and title of the state of Louisiana: *Provided,* that it shall be taken as a condition upon which the said state is incorporated in the Union, that the river Mississippi, and the navigable rivers and waters leading into the same, and into the gulf of Mexico, shall be common highways, and for ever free, as well to the inhabitants of the said state as to the inhabitants of other states and the territories of the United States, without any tax, duty, impost or toll therefor, imposed by the said state; and that the above condition, and also all the other conditions and terms contained in the third section of the act, the title whereof is herein before recited, shall be considered, deemed, and taken, fundamental conditions and terms, upon which the said state is incorporated in the Union.

SEC. 2. *And be it further enacted,* That until the next general census and apportionment of representatives, the said state shall be entitled to one representative in the House of Representatives of the United States; and that all the laws of the United States, not locally inapplicable, shall be extended to the said state, and shall have the same force and effect within the same, as elsewhere within the United States.

SEC. 3. *And be it further enacted,* That the said state, together with the residue of that portion of country which was comprehended within the territory of Orleans, as constituted

by the act, entitled "An act erecting Louisiana into two territories, and providing for the temporary government thereof," shall be one district, and be called the Louisiana district; and there shall be established in the said district, a district court, to consist of one judge, who shall reside therein, and be called the district judge; and there shall be, annually, four stated sessions of the said court held at the city of Orleans; the first to commence on the third Monday in July next, and the three other sessions progressively, on the third Monday of every third calendar month thereafter. The said judge shall, in all things, have and exercise the same jurisdiction and powers which, by the act, the title whereof is in this section recited, were given to the district judge of the territory of Orleans; and he shall be allowed an annual compensation of three thousand dollars, to be paid quarter yearly at the treasury of the United States. The said judge shall appoint a clerk of the said court, who shall reside, and keep the records of the court, in the city of Orleans, and shall receive for the services performed by him, the same fees heretofore allowed to the clerk of the Orleans territory.

SEC. 4. *And be it further enacted*, That there shall be appointed in the said district, a person learned in the law, to act as attorney for the United States, who shall, in addition to his stated fees, be paid six hundred dollars, annually, as a full compensation for all extra services. There shall also be appointed a marshal for the said district, who shall perform the same duties, be subject to the same regulations and penalties, and be entitled to the same fees to which marshals in other districts are entitled for similar services; and shall, moreover, be paid two hundred dollars,

annually, as a compensation for all extra services.

SEC. 5. *And be it further enacted,* That nothing in this act shall be construed to repeal the fourth section of an act, entitled, "An act for laying and collecting duties on imports and tonnage within the territories ceded to the United States, by the treaty of the thirtieth of April, one thousand eight hundred and three, between the United States and the French republic; and for other purposes;" and that the collection district shall be and remain as thereby established.

SEC. 6. *And be it further enacted,* That this act shall commence and be in force from and after the thirtieth day of April, eighteen hundred and twelve.

Approved, April 8, 1812.

3. The preamble of the **Louisiana Constitution of 1812** provides as follows:

> We, the Representatives of the People of all that part of the Territory or country ceded under the name of Louisiana, by the treaty made at Paris, on the 30th day of April, 1803, between the United States and France, contained in the following limits, to wit: beginning at the mouth of the river Sabine, thence by a line to be drawn along the middle of said river, including all its islands, to the thirty second degree of latitude—thence due north to the Northernmost part of the thirty third degree of north latitude—thence along the said parallel of latitude to the river Mississippi—thence down the said river to the river Iberville, and from thence along the middle of the said river and lakes Maurepas and Pontchartrain to the Gulf of Mexico—thence bounded by the said Gulf to the place of beginning, including all

Islands within three leagues of the coast—in Convention Assembled by virtue of an act of Congress, entitled "an act to enable the people of the Territory of Orleans to form a constitution and State government and for the admission of said State into the Union on an equal footing with the original States, and for other purpose;" In order to secure to all the citizens thereof the enjoyment of the right of life, liberty and property, do ordain and establish the following constitution or form of government, and do mutually agree with each other to form ourselves into a free and independent State, by the name of the State of Louisiana.

4. Act 55 of 1938, approved June 30, 1938, Louisiana Acts 1938, p. 169, 6 Dart, Louisiana General Statutes (1939) sections 9311.1–9311.4:

AN ACT

To declare the sovereignty of Louisiana along its seacoast and to fix its present seacoast boundary and ownership.

Whereas dominion, with its consequent use, ownership and jurisdiction, over its marginal waters by a State has found support because it is the duty of a State to protect its citizens whose livelihood depends on fishing, or taking from said marginal waters the natural products they are capable of yielding; also, has found support in that sufficient security must exist for the lives and property of the citizens of the State;

Whereas, according to the ancient principles of international law it was generally recognized by the nations of the world that the boundary of each sovereign State along the seacoast was located three marine miles

distant in the sea, from low water mark along its coast on the open sea;

Whereas, the seaward boundary of each sovereign State as so fixed is generally known as the three-mile limit of such State;

Whereas, the said three-mile limit was so recognized as the seaward boundary of each sovereign State, because at the time it became so fixed, three marine miles was the distance of a cannon shot and was considered the distance at which a State could make its authority effective on the sea by the use of artillery located on the shore;

Whereas, since the said three-mile limit was so established as the seaward boundary of each sovereign State, modern cannon have been improved to such an extent that now many cannon shoot twenty-seven marine miles and more and by the use of artillery located on its shore a State can now make its authority effective at least twenty-seven marine miles out to sea from low water mark;

Whereas, by the Act of Congress of February 20th, 1811, by which the State of Louisiana was admitted to the United States as a State, the southern boundary of Louisiana was fixed as follows: "thence bounded by the said gulf to the place of beginning, including all islands within three leagues of the coast;"

Whereas, therefore, the gulfward boundary of Louisiana is already located in the Gulf of Mexico three leagues distant from the shore, a width of marginal area made greater, by the above Act and agreement, than the well-accepted and inherent three-mile limit;

Whereas, a State can define its limits on the sea;

Whereas, the State of Louisiana owns the waters of the sea and the waters of the arms of the sea and the bed of the sea, the bed of the arms of the sea, and the seashore and the shores of all arms of the sea as far inland as the high water mark within the territory of the State of Louisiana; and

Whereas, the State of Louisiana, including all parts thereof and all territory that may be added thereto, forms a part of the United States of America, over which the said United States is authorized to exercise and exercises such powers and jurisdiction as the said United States is authorized by the Constitution of the United States to exercise thereover;

Section 1. Be it enacted by the Legislature of Louisiana, That the gulfward boundary of the State of Louisiana, is hereby fixed and declared to be a line located in the Gulf of Mexico parallel to the three-mile limit as determined according to said ancient principles of international law, which gulfward boundary is located twenty-four marine miles further out in the Gulf of Mexico than the said three-mile limit.

Section 2. That, subject to the right of the government of the United States to regulate foreign and interstate commerce under Section 8 of Article 1 of the Constitution of the United States, and to the power of the government of the United States over cases of admiralty and maritime jurisdiction under Section 2 of Article 3 of the Constitution of the United States, the State of Louisiana has full sovereignty over all of the waters of the Gulf of Mexico and of the arms of the Gulf of Mexico within the boundaries of Louisiana, as herein fixed, and over the beds and shores of the Gulf of Mexico and all

arms of the said Gulf within the boundaries of Louisiana, as herein fixed.

Section 3. That the State of Louisiana owns in full and complete ownership the waters of the Gulf of Mexico and of the arms of the said Gulf and the beds and shores of the Gulf of Mexico and the arms of the Gulf of Mexico, including all lands that are covered by the waters of the said Gulf and its arms either at low tide or high tide, within the boundaries of Louisiana, as herein fixed.

Section 4. That this Act shall never be construed as containing a relinquishment by the State of Louisiana of any dominion sovereignty, territory, property, or rights that the State of Louisiana already had before the passage of this Act.

U. S. GOVERNMENT PRINTING OFFICE: 1950

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 12, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA

DECREE PROPOSED BY THE UNITED STATES

This cause came on to be heard on the motion for judgment filed by the plaintiff and was argued by counsel.

For the purpose of carrying into effect the conclusions of this Court as stated in its opinion announced June 5, 1950, it is ORDERED, ADJUDGED, AND DECREED as follows:

1. The United States is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Gulf of Mexico, lying seaward of the ordinary low-water mark on the coast of Louisiana, and outside of the inland waters, extending seaward twenty-seven marine miles and bounded on the east and west, respectively, by the eastern and

western boundaries of the State of Louisiana. The State of Louisiana has no title thereto or property interest therein.

2. The State of Louisiana, its privies, assigns, lessees, and other persons claiming under it, are hereby enjoined from carrying on any activities upon or in the submerged area described in paragraph 1 hereof for the purpose of taking or removing therefrom any petroleum, gas, or other valuable mineral products, and from taking or removing therefrom any petroleum, gas, or other valuable mineral products, except under authorization first obtained from the United States. On appropriate showing, the United States may obtain the other injunctive relief prayed for in the complaint.

3. The United States is entitled to a true, full, and accurate accounting from the State of Louisiana of all or any part of the sums of money derived by the State from the area described in paragraph 1 hereof subsequent to June 23, 1947, which are properly owing to the United States under the opinion entered in this case on June 5, 1950, this decree, and the applicable principles of law.

4. Jurisdiction is reserved by this Court to enter such further orders and to issue such writs as may from time to time be deemed advisable or necessary to give full force and effect to this decree.

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 12, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA

MEMORANDUM IN SUPPORT OF PROPOSED DECREE

In its opinion of June 5, 1950, in this case (339 U. S. 699), the Court concluded that "the United States is entitled to the relief prayed for." 339 U. S. at 706. It stated that, "The parties, or either of them, may before September 15, 1950, submit the form of decree to carry this opinion into effect." 339 U. S. at 706. It is pursuant to that permission that the decree above set out is proposed by the United States.[1]

The relief prayed for in the complaint filed by the United States (p. 7)[2] was "that a decree be

[1] Except for the description of the area involved, the proposed decree in this case is identical with that proposed in *United States* v. *Texas*, No. 13, Original.

[2] A copy of the complaint filed in this case is attached as an Appendix, *infra*, pp. 9–12.

entered adjudging and declaring the rights of the United States as against the State of Louisiana in the area herein described, enjoining the State of Louisiana and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States, and requiring the State of Louisiana to account to the United States for all sums of money derived by it from the area herein described subsequent to June 23, 1947."

1. Paragraph 1 of the proposed decree embodies the declaration of rights sought by the United States, and is in the same form as paragraph 1 of the decree entered in *United States* v. *California*, 332 U. S. 804, 805, modified to describe the area set out in paragraph II of the complaint herein.

As was the case in the *California* proceeding, the declaration of rights is general in terms. See 332 U. S. 19, at 26, 805. We have always construed the similar declaration in the *California* case, and we construe the present one, as determining that the United States has full *dominium* and *imperium* in and over the described submerged area as against the State (see 339 U. S., at 717–719); that, as against the State, the United States has exclusive power and right with respect to the use, disposition, management, and control of the described submerged area and its resources (see 339 U. S., at 719); and that the

United States is possessed of whatever is the most accurate description of the full power and right to take and enjoy the complete benefit of the mineral and other resources of the bed of the sea—whether that description be characterized as fee-title, ownership, proprietorship, or paramount rights and full dominion.

Since portions of the Louisiana coast are irregular and contain many indentations, the United States believes that it will probably be necessary, as in the *California* case, presently "to determine with greater definiteness particular segments of the boundary" of the area claimed by the United States. 332 U. S., at 26. Accordingly, it is the intention of the United States to present to the Court, very shortly after the entry of the general decree, a petition for the entry of a supplemental decree, comparable to that presented in the *California* case in January 1948, adjudicating and determining those areas adjacent to the coast of Louisiana which are now in need of such determination. Other proposed supplemental decrees affecting other segments may also be submitted from time to time, as circumstances require.

2. Paragraph 2 of the proposed decree enjoins the State, and those claiming under it, from carrying on any activities in the described area, relating to the exploration, development, and production of oil, gas, or other mineral products of

value, unless prior authorization has been obtained from the United States. The need for such injunctive relief is clear on the face of the pleadings. Paragraph V of the complaint asserts that the State has made leases to various persons and corporations which have entered upon the described area, have drilled wells for the recovery of petroleum, gas and other hydrocarbon substances, and have been producing quantities of such materials. Louisiana's answer, in its Second Defense, admits that it has negotiated and executed leases for the development of petroleum products located in the described area, that wells which are producing petroleum substances have been drilled in such lands, and that it has derived royalties therefrom.

Injunctive relief against other types of trespasses is not sought at this time because no facts now known to the Government give rise to a present necessity for injunctive relief in any situations except those involving oil, gas, and other mineral substances of value. The proposed decree makes clear, however, that the United States is entitled to such other injunctive relief, upon a proper showing and as circumstances may require.

3. Paragraph 3 declares that the United States is entitled to a proper accounting for the monies derived by the State from the described area since June 23, 1947. That date, which appears in the

prayer for relief in the complaint (*supra*, p. 4, *infra*, pp. 11–12), is the date of this Court's decision in *United States* v. *California*, 332 U. S. 19; it was chosen because, in the Government's view, the Court's opinion gave adequate notice of the rights and power of the United States in the submerged coastal lands, and certainly gave fair warning to any State that its right to collect monies derived from that area was, at best, highly doubtful.

The proposed decree refrains from directing or requiring an actual accounting and payment, in order to give the parties an opportunity to agree between themselves as to the sums owing by the State of Louisiana. If such agreement cannot be reached in a reasonable time, the United States anticipates petitioning the Court for a further order relating to the ascertainment of the sums for which the State is accountable to the United States. It is, of course, not uncommon, in patent infringement and many other types of cases, for the initial judgment or decree merely to declare the plaintiff's rights and the defendant's liability, leaving the actual amount of the recovery for later determination. Cf. Rule 39 of the Court of Claims.

4. Paragraph 4, which is in the same form as paragraph 3 of the *California decree* (332 U. S., at 805), reserves jurisdiction to the Court to enter such further orders and to issue such writs as may be advisable or necessary. This reservation

of jurisdiction is especially appropriate because of the possibility, if not the likelihood, that further action of the Court may be required with respect to the adjudication of particular segments of the coast, to additional injunctive relief, and to the accounting.

It is respectfully submitted that the decree proposed by the United States be entered by the Court as soon as may be practicable.

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER 1950.

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 13, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA

COMPLAINT

The United States of America, by its Attorney General and its Solicitor General, brings this suit against the defendant, the State of Louisiana, and for its cause of action states:

I

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States.

II

At all times herein material, plaintiff was and now is the owner in fee simple of, or possessed of paramount rights in, and full dominion and power over, the lands, minerals, and other things underlying the Gulf of Mexico, lying seaward of the ordinary low-water mark on the coast of

Louisiana and outside of the inland waters, extending seaward twenty-seven marine miles and bounded on the east and west, respectively, by the eastern and western boundaries of the State of Louisiana.

III

The State of Louisiana claims some right, title, or interest in said lands, minerals, and other things adverse to the United States.

IV

In the exercise of the rights claimed by it, the State of Louisiana has, by general law, Act 30 of 1915 (Louisiana Acts, 1915, page 62), as superseded by Act 93 of 1936 (Louisiana Acts, 1936, page 276), as amended, authorized the leasing of lands underlying the Gulf of Mexico for the exploitation of petroleum, gas and other mineral deposits in the area herein described.

V

Pursuant to that law, the State of Louisiana has negotiated and executed such leases with various persons and corporations, and those persons and corporations have, in violation of the rights of the United States, paid to the State substantial sums of money, entered upon said lands and drilled wells for the recovery of petroleum, gas and other hydrocarbon substances. Such wells have been producing quantities of petroleum, gas and other hydrocarbon substances, which the lessees of the State have taken and converted to their own uses and for which the lessees have paid to the State substantial sums of money in bonuses,

rents and royalties reserved under the leases, but neither the State nor its lessees have recognized the rights of the United States nor have they paid to the United States either the value of the petroleum and other things taken from the area, or any royalties thereon.

VI

The State of Louisiana has no title to or interest in any of the lands in the area herein described, but possesses only those governmental powers which it has with respect to other lands of the United States within the lawful territorial jurisdiction of the State.

VII

The State has frequently and publicly denied the rights and powers of the United States in the area herein described and has claimed full and complete ownership of the area for itself and, unless the rights of the United States are established and declared by this Court, the State will continue to claim such ownership for itself and to exercise the rights incident to such ownership through its officers, agents and employees, and will continue to aid, abet and encourage others, as its lessees, to trespass upon and to take and use the minerals and other things of value in the area, in violation of the rights of the United States, from which the United States will suffer irreparable injury, and for which it has no adequate remedy except by this action.

Wherefore, plaintiff prays that a decree be entered adjudging and declaring the rights of the United States as against the State of Louisiana

in the area herein described, enjoining the State of Louisiana and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States, and requiring the State of Louisiana to account to the United States for all sums of money derived by it from the area herein described subsequent to June 23, 1947.

TOM C. CLARK,
Attorney General.
PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1948.

U. S. GOVERNMENT PRINTING OFFICE 1950



In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 12, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA

MEMORANDUM IN REGARD TO THE STATE'S OBJECTIONS TO THE DECREE PROPOSED BY THE UNITED STATES

This memorandum is in response to Louisiana's objections to the decree proposed by the United States and to the memorandum filed in support of those objections.

I

There is clearly no basis for the State's objections numbered 1 and 2 (Objections, pp. 1–2, 5), which are directed to paragraph 1 of the proposed decree. As has been heretofore pointed out (Memorandum in Support of Proposed Decree, p. 4), paragraph 1 is in the same form as paragraph 1 of the decree entered in *United States* v. *California*, 332 U. S. 804, 805, modified to describe the area involved herein. Since

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"*United States* v. *California*, 332 U. S. 19, controls this case" (339 U. S. 699, 704), there is obviously no inconsistency between the proposed paragraph 1, patterned after that in the *California* decree, and the decision of the Court in this cause. It follows, therefore, that there is no necessity for the additional language suggested in objection number 1, even if that language would, in effect, add anything to the decree as proposed. Nor is there any ground for deleting the second sentence of paragraph 1, which would decree that Louisiana has no title to or property interest in the lands here involved, since, as "California is not the owner of the three-mile marginal belt along its coast" (332 U. S. 19, 38), so is Louisiana without proprietary interest in the offshore lands underlying the Gulf of Mexico.

II

Objection number 3 appears to embrace several objections.

1. To the suggestion that the Court's opinion herein does not support or authorize injunctive relief (Objections, pp. 2, 6), it is enough to note that the prayer in the Complaint sought, in part, "that a decree be entered * * * enjoining the State of Louisiana and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States" (see Appendix to Proposed Decree, pp. 11–12), and

that the opinion herein concludes as follows: "We hold that the United States is entitled to the relief prayed for." 339 U. S. 699, 706.

2. Louisiana suggests that there is no congressional authority for the exercise by the United States or its lessees of the operations which the decree would enjoin (Objections, pp. 2, 7). It is difficult to see, however, what right the State has to raise that issue. To be sure, it has been held that the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended, does not apply to submerged lands of the type here involved (40 Op. A. G. 540), but it does not follow from that holding that there is no authority for continued production of existing oil and gas wells. On the contrary, it has been heretofore asserted,[1] and we now reiterate, that there is such authority, and that the Secretary of the Interior stands ready, on behalf of the United States, to authorize such continued production. The Secretary of the Interior has full power to make interim arrangements to protect and preserve the lands and resources adjudged to the United States from injury,

[1] See statement of Attorney General Tom C. Clark before Joint Hearings of the Committees on the Judiciary, considering S. 1988 and similar House bills, 80th Congress, Second Session, March 2–3, 1948, pp. 612, 679, and also remarks of Mastin White, Solicitor of the Department of the Interior, at the Hearings before the Senate Committee on Interior and Insular Affairs on S. J. Res. 195, 81st Congress, Second Session, August 14–19, 1950, at p. 31.

deterioration, seepage, drainage, or other harm.[2] This power includes authority to permit continued production, on appropriate terms, from existing wells. Cf. Executive Order No. 9633, 3 C. F. R., 1945 Supp., p. 123; 5 U. S. C. 485 (12); 40 Op. A. G. 41. If the United States asserts its willingness to make such arrangements, as it does, the State of Louisiana can have no standing or interest, in the present suit, to deny its power to do so.

3. The fact that the lessees are not parties to this suit (Objections, pp. 2, 7), does not bar their being named in the injunctive paragraph of the decree. This is not a conventional real property action between private claimants, but a controversy between the United States and one of its constituent States over the boundary between their respective spheres. For over a century it has been settled that in original suits of this type between sovereigns or quasi-sovereigns—as in the comparable case of a suit over water rights in interstate streams—the parties represent their citizens, grantees, and those who claim under them, and the latter are bound by the decree and their private rights are necessarily determined and affected by this Court's decision, whether or

[2] The State itself mentions the loss and detriment which would follow upon stoppage of existing production (Objections, p. 3).

not they have been parties.[3] *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 106–108; *Poole* v. *Fleeger*, 11 Pet. 185, 209; *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 725, 748; *Wyoming* v. *Colorado*, 286 U. S. 494, 508–9; *Nebraska* v. *Wyoming*, 325 U. S. 589, 627; see also *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 355–6; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237, and the other cases cited in *Wyoming* v. *Colorado, supra*, p. 509, fn. 5.

A notable example of a suit between sovereign litigants in which the rights of persons not parties to the proceeding were foreclosed by the decree is the case of *Louisiana* v. *Mississippi*, 202 U. S. 1. That suit involved a dispute over the location of the boundary between the States where it traverses the inland waters of Lake Borgne and the Mississippi Sound, but the controversy was precipitated by the efforts of the respective States to regulate and issue permits for the dredging of oysters from submerged lands in the disputed area. In the decree entered in the case, this Court adjudged the boundary to be that determined in

[3] Although Louisiana moved to dismiss the complaint herein on the ground that the State's lessees were indispensable parties to this cause, which motion, along with certain other motions, was denied (338 U. S. 806), it is significant that no one of the several lessees engaged in offshore oil and gas operations has sought to intervene in the proceedings. Louisiana's assertion at page 7 of its Objections that the United States opposed a motion to make the lessees parties undoubtedly refers to this motion to dismiss.

its opinion and included in its decree the following injunctive relief (202 U. S. 58–59):

> It is further ordered, adjudged and decreed that the State of Mississippi, its officers, agents and *citizens* be and they are hereby enjoined and restrained from disputing the sovereignty and ownership of the State of Louisiana in the land and water territory south and west of said boundary line as laid down on the foregoing map. [Italics supplied.]

Another instance of injunctive relief of this character is to be found in the case of *Wisconsin* v. *Illinois,* the celebrated interstate controversy involving the operation of the Chicago Drainage Canal. In the decree entered in that case on April 21, 1930, 281 U. S. 696, there appears the following:

> * * * the defendants, the State of Illinois and the Sanitary District of Chicago, their employees and agents, and *all persons assuming to act under the authority of either of them,* be and they hereby are enjoined from diverting any of the waters of the Great Lakes-St. Lawrence system or watershed through the Chicago Drainage Canal and its auxiliary channels * * *. [Italics supplied.]

And in *New Jersey* v. *Delaware,* 291 U. S. 361, a boundary proceeding, the decree entered by the

Court contains the following (295 U. S. 694, 698–699):

> The State of Delaware, its officers, agents and representatives, *its citizens and all other persons,* are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of the State of New Jersey over the territory adjudged to the State of New Jersey by this decree; and the State of New Jersey, its officers, agents and representatives, *its citizens and all other persons* are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of the State of Delaware over the territory adjudged to the State of Delaware by this decree. [Italics supplied.]

It is clear from these cases that injunctive relief may be granted in suits between sovereigns and may be made effective against persons deriving their rights from one of the sovereign litigants, even when those persons are not joined as parties to the litigation. On principle, the result should be the same. Since Louisiana's lessees have been represented by the State, are bound by the declaration of rights to be entered, and their rights in the designated area are conclusively determined, there is no reason why the injunction should not run against them. Even in private equity cases, an injunction may properly be issued against persons represented by the defendant (*Scott* v. *Donald,* 165 U. S. 107, 117)

and those who are its associates or confederates in performing the prohibited acts (*Chase National Bank* v. *Norwalk*, 291 U. S. 431, 436–7). The oil companies which are the State's lessees fall within both of these classes.

Moreover, in original suits of this character between sovereigns, in which multiplication of parties is highly undesirable and the public nature of the controversy is dominant, there is a special reason for departing from the rules as to persons against whom relief may be granted which may be thought to govern in private controversies. Adequate relief to the prevailing sovereign should not be refused because it is necessary to cover persons through whom the defending sovereign acts and whose interests it purports to serve, but who have properly not been made parties. In thus allowing the public nature of the controversy to control the relief, there is little likelihood that the lessees will be harmed because they have not been made parties. Their general interests in the disputed area have been, and are being, represented by the State. It is very doubtful whether there exist any unique or peculiar circumstances tending to show that relief should not be granted against a particular lessee, but, if there be such substantial reasons, the individual case can be dealt with administratively under the Federal Government's power to authorize operations seaward of the boundary, or, perhaps, by special judicial petition or proceeding.

4. The United States has no intention of stopping the production of oil from existing wells, and the proposed injunction would not have that effect (Objections, pp. 3, 6). The proposed paragraph 2 would enjoin oil and gas operations only if authorization is not first obtained from the United States and, as stated *supra*, pp. 3–4, the Secretary of the Interior stands ready, on behalf of the United States, to authorize continued production from existing wells on proper terms and conditions.

III

Although its Objections do not mention the point, Louisiana's Statement in Support of Objections (pages 8–9) seems to suggest that the injunctive aspects of the proposed decree are premature because of the possibility that questions will arise as to the distinction between areas affected by the decree and those not within it. In the Memorandum in Support of Proposed Decree we recognized (page 5) that it will probably be necessary, as in *United States* v. *California*, presently "to determine with greater definiteness particular segments of the boundary" claimed by the United States, and we indicated the intention of the United States to present a petition for the entry of a supplemental decree, seeking an adjudication and determination of the boundary along those portions of the coast of Louisiana which may require such determination.

But the possibility of supplemental proceedings to determine whether certain areas lie in Federal or State waters furnishes no basis for not entering a decree granting the injunctive relief sought by the United States. The major portion of the present oil and gas operations in offshore waters adjacent to Louisiana is situated in areas with respect to which there cannot, it is believed, be any genuine dispute as to the status of the waters involved. Many of the presently producing wells are situated more than 20 miles from the nearest point on the shore; many others are located offshore from portions of the coast which are relatively straight in configuration, where the boundary is clearly the ordinary low-water mark along the coast.

The State does not attempt to show that any existing operations will be hindered because of substantial doubts as to whether they are seaward or landward of the boundary. If it becomes apparent, after entry of the decree, that there are such border-line operations in areas as to which a reasonable dispute as to status arises, interim arrangements for continued operations pending an adjudication of the boundary at that spot can be made, for example, by means of a stipulation between the parties or by appointment of a receiver.

IV

Louisiana's objection to paragraph 3, the accounting paragraph, of the proposed decree (Objections, pp. 3, 9–10) overlooks entirely the basis for the relief to which the United States has been held to be entitled. The State, without proprietary or other right to do so, has undertaken to authorize its lessees to extract oil and gas in the submerged areas here involved in violation of the rights of the United States and has collected from the lessees rentals, royalties and other revenues for the authorization purportedly granted. The accounting sought by the United States is certainly not unreasonable, since no claim is made for revenues derived prior to June 23, 1947, the date of this Court's opinion in *United States* v. *California,* 332 U. S. 19. As we pointed out in the Memorandum in Support of Proposed Decree (p. 7), the decision in the *California* case gave adequate notice of the rights and powers of the United States in submerged lands situated offshore from the State of Louisiana, as well as those adjacent to other coastal States. This Court's opinion of June 5, 1950 (339 U. S. 699), holds the *California* decision to be controlling with respect to the questions presented in this case, and there is no inequity in requiring Louisiana to account for moneys received since the earlier decision.

CONCLUSION

The objections made by the State to the proposed decree are not sound in any respect.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 1950.

U. S. GOVERNMENT PRINTING OFFICE 1950

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SUPREME COURT U.S

(Jan. 17, 1949)

Supreme Court of the United States

OCTOBER TERM, ~~1948~~. ~~1949~~ 51

No. ~~12~~ 46, Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

OBJECTIONS TO MOTION FOR LEAVE TO FILE COMPLAINT BY THE UNITED STATES AGAINST THE STATE OF LOUISIANA.

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General, State of Louisiana.

L. H. PEREZ,
New Orleans, La.,

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.,
Of Counsel.

Appearing specially for the sole and only purpose of opposing this Motion.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1948.

No. —, Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

OBJECTIONS TO MOTION FOR LEAVE TO FILE COMPLAINT BY THE UNITED STATES AGAINST THE STATE OF LOUISIANA.

Now comes the State of Louisiana, through its Attorney General, appearing specially for the sole and only purpose of objecting to this Court granting leave to the United States to file Complaint against it herein, and for reasons therefor show:

I.

That this Court has no jurisdiction over the State of Louisiana in the proposed suit because Louisiana is a sovereign State which cannot be sued without its consent, and which has not consented to be sued herein.

Wherefore, the State of Louisiana prays that its objections be sustained, that the Motion of the United States for leave to file its complaint against Louisiana be fixed for hearing, oral argument, and the filing of further briefs, that the said motion be denied, and for all proper orders or judgment pertaining thereto.

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN K. MADDEN,
Assistant Attorney General,
State of Louisiana.

January, 1949.

Appearing specially for the sole and only purpose of opposing this Motion.

STATEMENT IN SUPPORT OF OBJECTIONS.

The United States seeks to bring suit herein against the State of Louisiana under the authority of Article III, Section 2, Clause 2 of the Constitution of the United States.

Section 2 provides that "The judicial Power shall extend * * * ;—"to controversies between two or more States";— * * * and between a State and foreign States."

Clause 2 thereof provides, "In all Cases affecting Ambassadors, other public Ministers and Consuls, *and those in which a State shall be a Party*, the Supreme Court shall have original jurisdiction. * * *"

Louisiana is a Sovereign State of the Union and cannot be sued without its consent either expressly granted in the Constitution, or by its specific consent in a particular case. Louisiana has not consented to be sued in this proposed suit, for reasons hereinafter stated, and the Court has no jurisdiction over the State of Louisiana for purposes of this suit.

In Article III, Section 2, Clause 1 of the Constitution, the States agreed in specific language that the judicial power of the United States would extend to suits brought by one or more States against another State, or by a foreign State; and in Clause 2 thereof it is provided that this Court shall have original jurisdiction *in those cases* in which a State shall be a party.

1. The Federal Government Has Not Consented to be Sued by the States.

It has been clearly settled that in the Constitution the Federal Government did not give its consent to be sued by a State without the consent of the Federal Government. *Monaco* v. *Mississippi*, 292 U. S. 313; *Kansas* v. *United States*, 204 U. S. 331.

2. Conversely, the States Have Not Consented to be Sued by the Federal Government.

We must equally conclude that under the Constitutional plan adopted by the Founding Fathers, the States declined to extend their consent to be sued by the Federal Government. The very proposition of extending the judicial power to "controversies between the United States and an individual State," and "to examine into and decide upon the claims of the United States and an individual State to territory" were not incorporated into the Constitution. Although, proposed, they were "peremptorily rejected" by the Federal Constitutional Convention which wrote the Constitution of the United States. *Florida* v. *Georgia*, 17 How. 478, 521; 2 Mad. Papers, 861; 3 Mad. Papers, 1366.

In an exhaustive analysis of this Section of the Constitution and the 11th Amendment thereto, Chief Justice Marshall, as organ of the Court in *Cohens* v. *Virginia*, 6 Wheat. 264, 5 Law Ed. 261 at p. 291, among other things, said:

> "It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. * * * We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. *The one or the other would be treason to the constitution.*" * * *
>
> "This leads to a consideration of the 11th amendment.
>
> "It is in these words: 'The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state.'
>
> "* * * *It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases; and in these a state may still be sued.*" (Emphasis ours)

It is highly significant that Chief Justice Marshall, in his exhaustive analysis, did not recognize the possibility of a suit by the United States against a State.

3. The *Texas* Case.

We are aware, of course, that in the past this Court exercised jurisdiction in several cases where suit was brought by the United States against an individual State, as was reviewed in the case of *United States* v. *West Virginia*, 295 U. S. 463, 55 Sup. Ct. Rep. 789, in which the Court said at p. 791: "It can no longer be doubted that the original jurisdiction given to this Court by section 2, Art. 3 of the Constitution, in cases 'in which a state shall be a party,' includes cases brought by the United States against a state." —citing *United States* v. *Texas*, 143 U. S. 621, and other cases of the United States against the States of Michigan, Minnesota, Utah, and the intervention of the United States in the case of Oklahoma v. Texas, without objection.

The precedent set in the *Texas* case was followed in the later cases against West Virginia and the others there cited, and in *United States* v. *State of Wyoming*, 331 U. S. 440.

In the *Texas* case, the Court significantly said: "Did they omit to provide for the judicial determination of controversies arising between the United States and one or more of the States of the Union?" And then the Court answered that question by stating: "This question is in effect answered by *United States* v. *North Carolina*, 136 U. S. 211. * * * " It is difficult to understand how the Court could have held that the *North Carolina* case answered this question because the Court itself then and there pointed out that in the *North Carolina case "it is true that no question was made as to the jurisdiction of this Court, and nothing was therefore said in the opinion upon that subject."* (Emphasis added)

Thus in the *Texas* case the Court paid no heed to the decision of the Convention to withhold the consent of the States to be sued by the Federal Government, and to its earlier decisions.

The Court took jurisdiction in *United States* v. *California* (1947), 332 U. S. 19, without objection having been urged by the State that it had not granted its consent to be sued.

Thus no question of lack of consent to be sued was raised in the *California* case.

All in all, the *Texas* case, the original precedent for this Court taking jurisdiction in cases of the United States versus individual States, was based on two propositions:

1. The basic supposition that the framers of the Constitution thought that there must be a "submission to judicial solution of controversies arising between these two governments," "**both** subject to the supreme law of the land" (143 U. S. 646), when as a matter of fact in the Constitutional Convention, which wrote the Constitution, that very proposition was "peremptorily **rejected**"!!

2. Upon the strength of the *North Carolina* case, *supra*, in which, to use the words of the Court, "no question was raised as to the jurisdiction of this Court, and nothing was therefore said in the opinion upon that subject"!!

We must, therefore, necessarily and inevitably come to this final conclusion about the *Texas* case: First, it was clearly wrong when it was decided, for reasons already stated. Second, its basic reasoning that there must be a "submission to judicial solution of controversies arising between these two governments," * * * "**both** subject to the supreme law of the land," (143 U. S. 646) requires the conclusion that in the Constitution the United States consented to be sued by the States. Hence, the *Texas* case has already been necessarily overruled, in part, by *Kansas v. United States*, 204 U. S. 331, *supra*, which categorically held that in the Constitution the United States did *not* consent to be sued by the States. If the reasoning of the *Texas* case cannot support that conclusion, it also cannot support the converse conclusion, that in the Constitution the States consented to be sued by the United States.

This Court should now complete the process, irrevocably started by *Kansas v. United States*, of completely overrul-

ing the *Texas* case and returning to the Constitution itself, that is, to its language, to the contemporary views of the Founding Fathers, to the decision of the Convention, and the early decisions of this Court.

4. The Opinions of This Court Confirm th[e] Under the Constitutional Plan the States Have not Consented to be Sued by the Federal Government.

In the *Texas* case, the Court did have positive precedent against the taking of jurisdiction, in the absence of consent, by the ruling of this Court in *Florida* v. *Georgia*, 17 How. 478. There the Federal government attempted by intervention to assert an interest or ownership in lands in a controversy between the two States over their boundary. On objection of the State that by the terms of the Constitution the Federal government could not be made a party in an original proceeding in this Court between States, the right to intervene either as party plaintiff or defendant was denied. The Court permitted the Attorney General of the United States to file a bill of information, but through Chief Justice Taney, as organ of the Court, held that the Court did not regard the United States in this mode of proceeding, as either plaintiff or defendant.

Even then, four of the Associate Justices dissented vigorously against the United States appearing in this ambiguous fashion. Mr. Justice Curtis stated (p. 505):

> "It is not to be admitted that there is any real conflict between those clauses of the Constitution, and our plain duty is so to construe them that each may have its just and full effect. This is attended with no real difficulty. When, after enumerating the several distinct classes of cases and controversies to which the judicial power of the United States shall extend, the Constitution proceeds to distribute that power between the supreme and inferior courts, it must be understood as referring, throughout, to the classes of cases before enumerated, as distinct from each other.

"And when it says, 'in all cases in which a State shall be a party, the Supreme Court shall have original jurisdiction,' it means, in all the cases *before enumerated* in which a State shall be a party. Indeed, it says so in express terms, when it speaks of the other cases where appellate jurisdiction is given.

"So that this original jurisdiction, which depends solely on the character of the parties, is confined to the cases in which are those enumerated parties, and those only.

"It is true, this course of reasoning leads necessarily to the conclusion that the United States cannot be a party to a judicial controversy with a State, in any court.

"But this practical result is far from weakening my confidence in the correctness of the reasoning by which it has been arrived at. The Constitution of the United States substituted a government acting on individuals, in place of a confederation which legislated for the States in their collective and sovereign capacities. The continued existence of the States, under a republican form of government, is made essential to the existence of the national government. And the 4th section of the fourth article of the Constitution pledges the power of the nation to guarantee to every State a republican form of government; to protect each against invasion; and, on application of its Legislature or Executive, against domestic violence. This conservative duty of the whole towards each of its parts forms no exception to the general proposition, that the Constitution confers on the United States powers to govern the people, and not the States.

"There is, therefore, nothing in the general plan of the Constitution, or in the nature and objects of the powers it confers, or in the relations between the general and state governments, **to lead us to expect to find there a grant of power over judicial controversies between the government of the Union and the several States.** On the contrary, the agency of courts to compel the States to obey laws of the Union, or to concede to the United States its rights or claims, would naturally be deemed both superfluous and impolitic: superfluous, because the States can act only through individuals, who are directly responsible, both civilly and criminally, to the laws of the United States, which are

supreme, and in the courts of the United States, which have jurisdiction to enforce all laws of the United States, and (p. 507) impolitic because calculated to provoke irritation and resistance, and to excite jealousy and alarm.

"It must be remembered, also, that a State can be sued only by its own consent. This consent has been given in the Constitution; but only in cases having such parties as are there described. The particular character of the parties to the controversy, into which a State has consented to enter, constitutes not only an essential element in that consent, but it is the sole description of what is agreed to. **The State of Georgia has consented to be sued by one or more States, or by foreign States, and by no other person or body politic.** * * * Certainly there is no power existing in this government to enlarge that consent so as to embrace in it anything to which it does not, by its terms, extend." (Emphasis ours)

In the same case, Mr. Justice Campbell, stated at p. 518:

"* * * *It was not in the design of the Constitution to alter or even modify the existing relations of any of the sovereign parties named in this Article, to legal jurisdictions, by enlarging their liableness to suits;* but its purpose was to erect tribunals to which they might resort for the determination of the suits which they might legally commence, or might voluntarily submit or were subject to, according to their pre-existing conditions. Thus no suit can be commenced against the United States, foreign States or Ambassadors, and public ministers; nor are they brought within the jurisdiction of the courts of the United States to any decree beyond that to which they were liable, without this Constitutional clause. The construction which allows the exemption of these parties as sovereigns, or their representatives, to operate, sanctions also the title of the States to the same right, for they are mentioned in the same clause; and the jurisdiction conceded to this court in reference to them is expressed in similar or identical language." (Emphasis added)

"The nature of the jurisdiction in regard to the States having been considered, the inquiry can now be made, can the United States be a party to a suit be-

tween two or more States. *The Constitution does not mention such a case.* **There were before the Federal convention propositions to extend the judicial powers to questions 'which involve the national peace and harmony;' 'to controversies between the United States and an individual State;' and in the modified form, 'to examine into and decide upon the claims of the United States and an individual State to territory.' None were incorporated into the Constitution, and the last was peremptorily rejected.** The jurisdiction of this court over cases to which the United States and the States are respectively parties,' is materially different—the one original, the other appellate only. There was no encouragement nor serious countenance, to the proposition to vest this court with jurisdiction of such cases. *This court is organized and its members appointed by one of the parties. Their influence extends with the jurisdiction of this court, their means of reputation with its powers, their habitual connection with the Federal legislation naturally inspires a sentiment in favor of the Federal authority.* These operative causes of bias were known: and apprehensive as the States were of consolidation and the overbearing influence of the central government, we can well understand why only the modified proposal as to jurisdiction was pressed to a vote. I repeat that the enumeration of the parties in this Article of the Constitution did not enlarge the liabilities of the States to suits, but it only provided tribunals where suits might be brought, to which they were already subject or might desire to commence. Nor does the clause authorizing suits between two or more States afford any contradiction to this conclusion." (Emphasis added)

5. The Texas Case Should Be Reexamined and Overruled, and the Decision of the Constitutional Convention Adhered To.

It was thus the clear view of the Constitutional convention and the early decisions of this Court, that in the Constitution no State had consented to be sued by the United States, and could not be so sued without its consent. While a new view was apparently announced in the *Texas* case,

we must frankly say now that the importance of the point, and the extraordinary nature of the claim now sought to be asserted against Louisiana, necessarily requires a complete re-examination of the *Texas* decision and adherence to the classic, original view of the framers of the Constitution and to the words of that document.

It is highly significant that not until 1892 did the Court arrive at the conclusion that Article III of the Constitution contained an implied consent by the States to be sued by the Federal Government. It is still more significant that this conclusion was predicated mainly on an *assumption* by the Court that the framers would not have failed to recognize and provide for so important a matter as suits by the Federal Government against States. But this assumption is not borne out by the words of the Constitution, nor by the action of the Convention, nor by the views of the Founding Fathers.

The *Texas* case presents a type of Constitutional interpretation which this court has often condemned. Because the judges thought it important in 1892 that the Federal Government should be permitted to sue a State, they assumed that the framers must have had the same view. Actually the framers of the Constitution thought it vitally important not to permit the Federal Government to sue a State without its consent, and expressly refused to extend any such consent in the Constitution. Hence, what the State of Louisiana asks is that the Court examine this question in the light of the Constitution itself, the contemporary records and authorities, and the far-flung ramifications of the question. This Court has often held that it is the Constitution which binds it, not the constructions which have been placed upon that instrument by the views of judges. No better expression of this basic principle could be found than the statement of Mr. Justice Douglas printed in the "Journal of the American Judicature Society," December, 1948, page 106, from which we quote the following:

> "A judge who is asked to construe or interpret the Constitution often rejects the gloss which his predecessors have put on it. For the gloss may, in his view, offend the spirit of the Constitution or do violence to it. That has been the experience of this generation and of all those that have preceded. It will likewise be the experience of those which follow. And so it should be. For it is the Constitution which we have sworn to defend, not some predecessor's interpretation of it. *Stare decisis* has small place in constitutional law."

The *Texas* case should be overruled, not as a matter of refined constitutional interpretation, but because it is flatly contrary to the Constitution and the decision of the Convention to withhold the consent of the States to be sued by the Federal Government.

a. The States must be free from the crippling interference of judicial compulsion by the Federal Government.

First, the point involved is one of the gravest importance to all the States of the Union in the administration of their affairs generally. The traditional and fundamental principle of the immunity of the sovereign to suit has recently been given heartening reaffirmance by this Court in *Great Northern Life Insurance Co.* v. *Read* (1944), 322 U. S. 47, and *Ford Motor Co.* v. *Department of Treasury of State of Indiana* (1945), 323 U. S. 459. In those cases it was cogently pointed out that as a sovereign a *state* "must be free from judicial compulsion in the carrying out of its policies" (322 U. S. 51); and that "the history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent" in a very strict sense (322 U. S. 54).

While a sovereign must be free from the crippling interference of judicial compulsion, there are many ways by which controversies between sovereigns are settled all the time. Under international law, and in the intergovern-

mental relations between the states and our Federal Government, many treaties and agreements are arrived at in a continual course of negotiation. Thus, if the Federal Government decides, as a matter of policy and necessity for future national defense, to conserve the oil and other resources within the areas here involved, it can seek to do so through an orderly and fair procedure. Under the Constitution, such matters of policy are for Congress, the legislative branch of the government. For instance, Congress may lay down a basic policy that the conservation of those resources should be carried out by the Federal Government, and authorize officials of the Federal Government to negotiate some joint arrangement with the states, or to acquire the areas involved by purchase or eminent domain.

The procedure above outlined is an example of the practical methods of settlement of problems between governments which underlies the reciprocal immunity from suit between sovereigns.

b. The proposed litigation is impolitic and would destroy the sovereignty of the State.

Second, the present case well illustrates the reasons for the reciprocal immunity from suit which was designed to remain between Federal and State sovereignties. The Federal Government is now demanding not only property rights and natural resources within the State's boundaries, but large sums of money. If such an extraordinary and unprecedented claim were to be upheld, it might well be that the State would be unable to pay these sums without impairing vital functions of government. Also we know of no legal process by which the Federal Government can enforce such a claim. But even if such a process could be found, the enforcement of the claim might easily bankrupt the State and destroy its economic and eventually its political existence. These are the sober consequences that must be faced if the doctrine of the immunity of the sov-

ereign from suit without its consent is not rigidly adhered to. These possible consequences demonstrate graphically why the Founding Fathers did not consent and indeed would never have consented that the States might be sued by the Federal Government at its pleasure.

The consent to be sued is consent to be destroyed.

Conclusion.

In the Constitutional plan there is no more reason to assume that the States consented to be sued by the Federal Government than there is to assume that the Federal Government consented to be sued by the States. And this Court has clearly decided that the Federal Government has not consented to be sued by a State. It should likewise decide that the States have not consented to be sued by the Federal Government.

This Court has only taken jurisdiction of suits brought by the United States against individual States (1) when the States consented to suit, and (2) in the *Texas* case, which simply had no basis in authority, and which was indeed directly contrary to the positive decision of the Constitutional Convention, specifically withholding the consent of the States to be sued by the Federal Government, and to the earlier opinions of this Court. We, therefore, submit that the *Texas* case should be overruled, and that this Court should return to the Constitution as written and as previously understood and interpreted.

From the broader standpoint, the State of Louisiana has never consented to be summarily dragged by the Attorney General before the bar of a Federal Court. To do so in this case would cripplingly interfere by judicial compulsion with Louisiana's administration of its own affairs and upset the balance of our dual form of government. It would be flagrantly incompatible with the very nature of the doctrine of sovereign immunity and with the Constitutional plan; and it would cast the shadows of twilight over sov-

ereignty of the States, leaving them in a position completely inferior to an almost all-powerful central government.

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

L. H. PEREZ,
New Orleans, La.,
BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.,
Of Counsel.

Appearing specially for the sole and only purpose of opposing this Motion.

SUPREME COURT, U.S.

Supreme Court of the United States

OCTOBER TERM, [redacted]

No. 7[redacted], Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

SUPPLEMENTAL MEMORANDUM OF LOUISIANA IN SUPPORT OF ITS OBJECTIONS TO MOTION BY THE FEDERAL GOVERNMENT FOR LEAVE TO FILE A COMPLAINT AGAINST LOUISIANA.

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.
JOHN L. MADDEN,
Assistant Attorney General, State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.,
Of Counsel.

Appearing specially for the sole and only purpose of opposing this Motion.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1948.

No. , Original.

UNITED STATES OF AMERICA, *Plaintiff*,

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STATE OF LOUISIANA.

SUPPLEMENTAL MEMORANDUM OF LOUISIANA IN SUPPORT OF ITS OBJECTIONS TO MOTION BY THE FEDERAL GOVERNMENT FOR LEAVE TO FILE A COMPLAINT AGAINST LOUISIANA.

STATEMENT.

This supplemental memorandum is submitted in reply to the Supplemental Memorandum of the Federal Government in support of its motion to file a complaint against Louisiana. It is also filed for the additional purpose of amplifying the original statement of Louisiana in support of its objections to the said motion.

1. By Its Failure to Dispute It, the Federal Government Has in Substance Conceded that the Reasoning in the Texas Case is Wrong and that Such Case Was Overruled by Kansas v. United States.

The Federal Government has made no attempt whatever to answer the basic argument set forth in Louisiana's Objections. In Olympian fashion, it has merely assumed the point by the extraordinary remark that:

> "It is unthinkable that under our Constitutional system a State may not be sued by the United States without its consent." (page 2.)

The Federal Government is thus in the position of having conceded, by its silence, that the Founding Fathers declined to extend, in the Constitution, the consent of the States to be sued by the Federal Government; that proposals having that effect were rejected by the Constitutional Convention; that the view of the Founding Fathers was affirmed in the early decisions of this Court; that the entire foundation of reasoning in the *Texas* case is wrong, with no basis whatever in authority, and was irretrievably crushed by the decision of this Court in *Kansas* v. *United States*, 204 U. S. 331.

2. The Attempt by the Federal Government in this Case to Rely Upon the Constitutional Provision for Jurisdiction of Suits Between States Demonstrates the Utter Lack of Substance of Its Position.

In Article III of the Constitution it is stated in clear language that the judicial power of the United States shall extend "to controversies between two or more States." This provision, in effect, reincorporates the substance of Article IX of the Articles of Confederation, whereby the States consented to submit controversies between them to an instrumentality of the central Government.

But that is of no benefit whatever to the Federal Government in this case. Indeed, the fundamental weakness of its

position, the utter lack of Constitutional source for its position, is shown by the statement on page 2 of its Supplemental Memorandum, that:

> "There is here presented, therefore, 'a clash of interests which between sovereign powers could be traditionally settled only by diplomacy or war. The original jurisdiction of this Court is one of the alternative methods provided by the Framers of our Constitution.' *Nebraska* v. *Wyoming*, 325 U. S. 589, 608 (in which the United States intervened)."

Reading this statement, the uninformed gains the impression that *Nebraska* v. *Wyoming* held that there was involved therein a clash of interests between the Federal Government and a State Government, and that the original jurisdiction of this Court provided an alternative method for settling such a clash of interests. But that impression has no support whatever in the case cited. In *Nebraska* v. *Wyoming*, the statement quoted was made in deciding a motion by the State of Colorado to dismiss Nebraska's complaint; Colorado asserting that no controvery existed *between the two States*. The Court held that a genuine controversy did exist between the two States, saying (325 U. S. 608):

> "A genuine controversy exists. The States have not been able to settle their differences by compact. The areas involved are arid or semi-arid. Water in dependable amounts is essential to the maintenance of the vast agricultural enterprises established on the various sections of the river. The dry cycle which has continued over a decade, has precipitated a clash of interests, which between sovereign powers could be traditionally settled only by diplomacy or war. The original jurisdiction of this Court is one of the alternative methods provided by the Framers of our Constitution. State of *Missouri* v. *Illinois*, 180 U. S. 208, 241; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237."

3. The California Cause Provides No Foundation for this Motion.

On pages 3 and 4 of the Federal Government's Supplemental Memorandum, it is stated that:

> "The jurisdiction under which the Court heard and rendered its decision in the *California* case (332 U. S. 19) is the same as that now invoked by the United States in respect to its controversy with the State of Louisiana."

Thus we can only conclude that the Federal Government is arguing that the *California* case is a precedent for the taking of jurisdiction by this Court in the proposed suit and for granting the motion for leave to file a complaint against Louisiana.

However, the issue raised now on this motion was never raised at all in the *California* case, because there California consented to be sued, impliedly at least. But Louisiana has not consented and does not consent to be sued by the Federal Government in this case and this Court cannot have jurisdiction over Louisiana in the absence of such consent.

4. This Court Has Had no Opportunity to Examine the Soundness vel non of the Texas Case, Since Kansas v. United States.

In its Supplementary Memorandum, the Federal Government cites thirteen cases in a footnote on page 2 which are relied upon as following the decision in the *Texas* case. But in not one of those cases did any State refuse consent to be sued. The result is that the issue now raised in this motion has never been presented to this Court since the reasoning in the *Texas* case was destroyed by *Kansas* v. *United States*.

5. Portions of the Record of the Constitutional Convention of 1787 Amplifying the Position Taken by Louisiana in Its Objections.

When Louisiana filed its objections and statement in support thereof, on January 17, 1949, time did not permit of exhaustive research into the actual record of what transpired at the Constitutional Convention in 1787. Since then we have carefully examined that record, and painstaking study has been made of, (1), the Philadelphia Convention Journal, published under the direction of the President of the United States, conformably to Congressional Resolution of March 27, 1818 (Wait, 1819); (2), the Madison Papers (1840) Longtree and Sullivan (taken from original documents); and (3), House Document 398 ("Foundation of the United States," a United States document of the 69th Congress, 1st Session).

The national judiciary, its functions and powers, were initially considered on the respective dates of May 29 and June 12, 1787, but nothing was considered then of specific relevance to the question here presented.

It was not until August 6, 1787 that an individual State was mentioned as a subject of jurisdiction by the Supreme Court.

(A) The Proposition Now Urged by the Federal Government was Peremptorily Rejected by the Constitutional Convention of 1787.

On August 6, 1787, the Committee on Detail submitted a draft of a Constitution to the Convention, and for the first time, as heretofore stated, an individual State was mentioned as the subject of jurisdiction. Article XI, Section 3 of the proposed draft read as follows:

> "The jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the legislature of the United States; to all cases affecting ambassadors, other publick ministers and consuls; to the trial of impeachments of officers of the United States; to all

cases of admiralty and maritime jurisdiction; to controversies between two or more States (except such as shall regard territory or jurisdictions); between a state and citizens of another state; between citizens of different states; and between a state and the citizens thereof, and foreign states, citizens or subjects. In cases of impeachment, cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, this jurisdiction shall be original. In all the other cases before mentioned, it shall be appellate, with such exceptions and under such regulations as the legislature shall make. The legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations, which it shall think proper, to such inferior courts as it shall constitute from time to time." (Philadelphia Conventional Journal, pp. 226-227; House Document 398, p. 479; The Madison Papers, Vol. II, pp. 1238-1239.)

Significantly, on August 22, 1787, the Committee on Detail, having considered the draft of a Constitution which was submitted to the Convention on August 6, 1787, made recommendations, one of which was:

"Between the fourth and fifth lines of the third section of the Eleventh Article, after the word 'controversies,' insert 'between the United States and an individual State, or the United States and an individual person'." (Philadelphia Convention Journal, p. 278; House Document 398, p. 596; The Madison Papers, Vol. III, p. 1399).

Hence, on the significant date, August 22, 1787, the proposition was made to the Convention, for the first and for the last time, that the jurisdiction of the Supreme Court extend to controversies "between the United States and an individual State . . . .". But the proposition was rejected. No action was taken on it. Thereby the States affirmatively refused to confer such jurisdiction on this Court.

The Committee of the Whole gave thorough and exacting study to the judiciary article of the proposed Constitution on August 27, 1787, and many amendments thereto were

adopted; however, no one undertook to re-urge the proposition that the jurisdiction of the Supreme Court extend to controversies "between the United States and an individual State."

So, in the case of *Florida* v. *Georgia*, 17 How. 478, 518, Mr. Justice Campbell aptly summarized the record of the Convention on the point by saying:

> "There were before the Federal convention propositions to extend the judicial powers to questions 'which involve the national peace and harmony'; 'to controversies between the United States and an individual State'; and in the modified form, 'to examine into and decide upon the claims of the United States and an individual State to territory.' None were incorporated into the Constitution, and the last was peremptorily rejected."

When we view the *record* of the Constitutional Convention of 1787 we see there, positively and unmistakably, that the proposition to extend the jurisdiction of the Supreme Court to controversies "between the United States and an individual State" was not lost sight of but "peremptorily rejected." As a result it is absolutely impossible to reconcile (1) the mere assumption of the Court in the *Texas* case that the Framers of the Constitution would not have failed to recognize and provide for so important a matter as suits by the Federal Government against States, with (2) the specific language written into the Constitution, and with (3), the specific language deliberately omitted.

All this is also confirmed by the Tenth Amendment, whereby all powers not delegated to the United States by the Constitution are reserved to the States. No power was delegated to the Federal Government to sue a State without its consent.

(B) "Judicial Power" and "Jurisdiction" Are Not the Same Thing.

On August 27, 1787, when the Convention was giving meticulous consideration to the judiciary article, preparatory to the writing of the draft of a Constitution in its final form, a motion was made and seconded "to strike out the words 'the jurisdiction of the Supreme Court' and to insert the words 'the judicial power' ". The motion passed in the affirmative. (Philadelphia Convention Journal, p. 298; House Document 398, p. 625; The Madison Papers, Vol. III, p. 1438.)

Commenting on this change in the judiciary article, Warren points out in his work, entitled "The Making of the Constitution," on pages 331-332, that:

> "It is always important to bear in mind that there is a vital distinction between a court's jurisdiction and a court's power. Judicial power comprises the functions by a court *after it has attained jurisdiction.*" (Emphasis supplied.)

Judicial power cannot be exercised in controversies between the Federal Government and a sovereign State of the Union until the latter gives consent, and the Court thereby obtains jurisdiction as the basis for the exercise of judicial power.

6. The Juridical Equality of Sovereigns and the Unvarying Quality of Sovereign Immunity.

The immunity of the United States from suit without its consent cannot be based on any idea that it is of any higher caliber as a sovereign. It is a fundamental rule of International Law that all sovereigns are juridically equal and that the immunity of each is of the same precise quality as the immunity of the others. In our country, as sovereigns, the United States and the States are juridically equal, except as specifically modified by the language of the Constitution of the United States.

In the case of *Berizzi Bros. Co.* v. *The Pesaro*, 271 U. S. 562, Mr. Justice Van Devanter quoted approvingly from the landmark case of "The Schooner Exchange," 7 Cranch. 116, 136, in which the world was described as

> "being composed of distinct sovereignties, possessing equal rights and equal independence."

This Court has declared it to be settled law that in the Constitution the Federal Government did not give its consent to be sued by a State without the consent of the United States; *Monaco* v. *Mississippi*, 292 U. S. 313; *Kansas* v. *United States*, 204 U. S. 331. To permit the Federal Government to sue a State without the latter's consent would not only have the effect of reading into the Constitution something that is not there and be an abuse of the clear intention of the Framers thereof that no such privilege be granted, but it would destroy the great doctrine of sovereign immunity by tearing down the basic principle upon which the rule was founded.

7. It Can Never Be Presumed that One Sovereign is Subject to Suit of Another in the Latter's Court, in the Absence of Consent Given in Clear and Unambiguous Terms.

If one sovereign, on its own motion and in its own Court, can sue another sovereign at its pleasure, the rights of the latter sovereign could be destroyed in a single suit.

Hence, the far-reaching implications of the mere concept of suit by one sovereign, in its own Court, against another, are such that we can never assume or presume consent to such a suit, in the absence of a consent stated in the clearest and most unambiguous terms.

Therefore, concluding with primary logic, no creator ever intentionally sows the seeds of its own destruction.

SUMMARY.

The far-reaching and tremendously-destructive implications of the very concept of suit by one sovereign, in its own Court, against another sovereign, are such that we can never presume or assume such consent, in the absence of a consent stated in the most crystal-clear and unambiguous terms.

But the Constitution contains no provision extending the consent of the States to be sued by the Federal Government. Indeed, proposals to grant that consent were made to the Constitutional Convention and rejected. And the early decisions of this Court uniformly confirm the deliberate decision of the States to withhold their consent to such suits. True, the *Texas* case erroneously assumed that the Federal Government and the States had each consented to be sued by the other, "*both* subject to the supreme law of the land." But, the entire foundation of reasoning in the *Texas* case is not only wrong—it was irretrievably crushed by *Kansas* v. *United States*, which held that the United States may not be sued by a State without its consent. In so holding, the Court must necessarily have conceded, by obvious implication, that the converse situation holds true, viz., that a State may not be sued by the Federal Government without the former's consent.

All these things the Federal Government does not even dispute. It does not dispute them because it cannot do so.

In our system of government, the States are the senior sovereigns. They created the new sovereign of the Federal Government and endowed it with limited powers only, so as to maintain a dual system of government. If that dual system of sovereignty is to survive, it is essential that the consent of the States to be sued be restricted to those cases expressly provided for in the Constitution and contemplated by the Founding Fathers; otherwise the forcing of an assumption of consent upon the States presages their destruction, and that of our dual system.

CONCLUSION.

Louisiana has not consented to be sued by the Federal Government in the proposed suit, and hence this Court has no jurisdiction over Louisiana and the motion of the Federal Government for leave to file a complaint against Louisiana should be denied.

Respectfully submitted,

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.,
Of Counsel.

Appearing specially for the sole and only purpose of opposing this Motion.

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#6

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

BRIEF IN OPPOSITION TO THE MOTION OF THE FEDERAL GOVERNMENT FOR LEAVE TO FILE A COMPLAINT AGAINST LOUISIANA.

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General, State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.,
Of Counsel.

Appearing specially for the sole and only purpose of opposing this Motion.

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Supreme Court of the United States

OCTOBER TERM, 1948.

No. Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

BRIEF IN OPPOSITION TO THE MOTION OF THE FEDERAL GOVERNMENT FOR LEAVE TO FILE A COMPLAINT AGAINST LOUISIANA.

Statement.

Louisiana's objections to the jurisdiction of this Court were filed on January 17, 1949. In answer, the Federal Government filed a four-page Supplemental Memorandum to which Louisiana replied in a Supplemental Memorandum. Sometime later the Federal Government filed a Brief, to which this Brief is submitted in reply.

On This Motion the Federal Government Has the Burden of Proof.

On this motion for leave to file a complaint against Louisiana, the Federal Government has the laboring oar. As set forth in Point 7 (p. 25), the consent of a Sovereign State to be sued is not something which can be presumed;

rather, it is presumed that no Sovereign State has consented to be sued until clear affirmative evidence thereof is presented.

Full burden of proof is thus heavily on the Federal Government to demonstrate the granting of the consent of Louisiana to the present suit; and in this brief, we shall show that the United States has utterly failed to meet that burden.

The Drastic Nature of the Claim Which the Federal Government Seeks to Assert Against Louisiana.

The extraordinary claim which the Federal Government seeks to assert against Louisiana is not only a claim to territory. In addition, it demands vast sums of money from Louisiana *in tort*. While there were several propositions made to the Constitutional Convention that the judicial power of this Court should extend to conflicting claims of the United States and individual States, the only proposition specifically submitted to a vote was to confer jurisdiction over claims between the United States and particular States as to *territory*. The broader proposals were simply ignored as unworthy of debate, and the proposal as to territory was flatly rejected.

There is every reason to believe that as a whole the delegates to the Convention would have been horrified at the suggestion that the Federal Government should be able, in its own Court, and at its pleasure, to sue a Sovereign State *in tort* for vast sums of money.

1. The Constitutional Convention Rejected, Not Once But Five Times, the Very Proposition Now Urged by the Federal Government.

First: The Convention had before it the Paterson Plan, offered June 17, 1787, which was given prominent mention in the record of the Convention (H. Doc. 398, 69th Cong.; 1st Session; pp. 769 and 973; 1 Elliott's Debates, p. 177).

Included in the plan was a striking recommendation which read as follows:

> "Provision ought to be made for hearing and deciding upon all disputes arising between the United States and an individual state, respecting territory."

On June 19, the Convention adopted a motion by a vote of 7 to 3, 1 state divided, to reject the Paterson Plan. This rejection included the above proposition. (1 Elliott's Debates 180).

SECOND: Mr. Pinckney submitted several propositions to the Convention on August 20, 1787, and they were referred to the Committee of Detail. One of the propositions read as follows:

> "The jurisdiction of the Supreme Court shall be extended to all controversies between the United States and an individual state; or the United States and the citizens of an individual state" (the Madison Papers; Vol. III, p. 1366; H. Doc. 398, 69th Cong.; 1st Sess.; p. 572).

No action was taken on the proposition.

THIRD: On August 22, 1787 Mr. Rutledge for the Committee of Detail, submitted a report to the Convention, suggesting the following amendment to the Randolph or Virginia Plan, then before the Convention:

> "Between the fourth and fifth lines of the third section of the eleventh article, after the word 'controversies', insert 'between the United States and an individual state, or the United States and an individual person'" (The Madison Papers, Vol. III, p. 1399; H. Doc. 398, 69th Cong.; 1st Sess.; p. 595-6).

The record shows that *no action was taken on this proposition.*

FOURTH: Mr. Carroll made the following motion to the Convention on August 30, 1787:

"Nothing in this Constitution shall be construed to alter the claims of the United States, or of the individual states, to the western territory; but all such claims shall be examined into, and decided upon, by the Supreme Court of the United States." (The Madison Papers, Vol. III, p. 1465; H. Doc. 398, 69th Cong.; 1st Sess.; p. 644).

While the proposed extension of jurisdiction would have only applied to the United States and individual western states, it represents, nevertheless, the same basic proposition which is now under consideration.

The Carroll motion was postponed, and the record shows that *the Convention never took action on it.*

Turning from definitive rejection by inaction to peremptory rejection by action, we come to the proceedings of the Convention on August 30, 1787.

FIFTH: On the date last mentioned the Convention was considering Article XVII of the Randolph Plan (H. Doc. 480), regarding the admission of new states, and a discussion arose in regard to claims of the United States and individual states to territory (The Madison Papers; Vol. III, pp. 1465-1466; H. Doc. 398, 69th Cong.; 1st Sess.; pp. 644-645).

Mr. Gouveneur Morris proposed the following addition to the draft of the Constitution:

"The Legislature shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States; and nothing in this Constitution contained shall be so construed as to prejudice any claims, either of the United States or of any particular state."

Thereupon, Mr. L. Martin made a motion to amend the proposal of Mr. Morris so as to add the following sentence:

"But all such claims may be examined into, and decided upon, by the Supreme Court of the United States."

Mr. Morris interposed the suggestion that the L. Martin motion was unnecessary, stating that "all suits to which the United States are parties are already to be decided by the Supreme Court."

Mr. L. Martin expressed disagreement with that statement, and *his motion was put to a vote and defeated.*

The Federal Government infers that the loss of the amendatory motion was influenced by the statement of Mr. Morris; however, we are not concerned with inference but fact, and the recorded fact is that the Convention rejected the amendatory motion of Mr. L. Martin by the vote of the delegates and thereby decisively and lastingly excluded from the judiciary article any provision conferring judicial power on this Court "to examine into and decide upon the claims of the United States and an individual state to territory or property." In this way the Convention confirmed its four other rejections of the same proposal, and of even broader proposals.

Also, the participation of Mr. Gouverneur Morris in the debates of the Convention were such that the other delegates, by August 1787, must have had slight regard for his erratic and offhand views, seldom pursuing a cohesive train of thinking.*

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* The Federal Government could not have selected a member of the Convention less qualified to reflect its views on the Constitution and to understand the meaning of that document, than Gouverneur Morris.

The record of the Convention's proceeding shows he made more speeches and statements than any other delegate, and that he was wrong and voted down oftener than any other delegate at the Convention. He made a great quantity of statements in innumerable speeches in the Convention which do not at all have the weight of authoritative interpretation. The Convention record is replete with Mr. Gouverneur Morris' haughty and cynical attitude towards not only the Convention and its Members, but towards the States and the people of America which do not at all reflect the language or spirit of the Constitution (H. Doc. 398).

At p. 319, Mr. Madison quotes Mr. Gouverneur Morris as saying that the Second Branch, (U. S. Senate) "must have great personal property; it must have the aristocratic spirit, and it must live to lord it thro' pride".

At p. 319, he said "State attachments and State improvements have been the bane of this country we cannot annihilate, but we may, perhaps, take out the teeth of the serpents.".

At p. 330, he stated that he thought the rule of representation (in the 1st Branch, House of Representatives) ought to be so fixed as to secure

"Moreover, from the standpoint of sheer logic, we must conclude that the delegates were completely unimpressed by Mr. Morris' contention that the phrase "the judicial power shall extend to" . . ."controversies to which the United States shall be a party" conferred some kind of jurisdiction over the Sovereign States of the Union. Such a contention utterly begs the question; for the language which

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to the Atlantic States a prevalence in the National Councils, by irrevocably fixing the number of representatives which the Atlantic States should respectively have, and the number which each new State will have.

At p. 335, he opposed granting to the House of Representatives exclusive right to originate money bills.

At p. 348, he changed about face, and thought the Southern States would have more than their share of representation in the Upper Branch, and that property should not have all the weight in qualification, as he first proposed.

At p. 351, he thought that in time the western people would out-number the Atlantic States, and he wished to put it in the power of the latter to keep the majority of votes in their own hands.

At p. 358, he wound up his debate by stating, "The best course that could be taken would be to leave the interest of the people to the representatives of the people."—To which Mr. Madison answered, p. 358, in effect that he was not a little surprised to hear this implicit confidence urged by a member who on all occasions had inculcated so strongly the political depravity of men and the necessity of checking one vice and interest by opposing to them another vice and interest.

Mr. Gouveneur Morris also paid his compliments to the Judges, when Mr. Madison reports, p. 401, that he, Morris, "supposed it would be improper for an impeachment of the executive to be tried before the Judges. The latter would in such case be drawn into intrigue with the legislature and an impartial trial would be frustrated. As they would be much about the seat of government, they might even be previously consulted and arrangements might be made for a prosecution of the executive."

At p. 549, he advocated the expediency of an absolute negative in the executive over laws enacted by Congress.

Mr. Gouverneur Morris was wrong in all these haughty and wandering observations. Equal representation of States in the U. S. Senate was adopted by the Convention. The Chief Justice was authorized to preside in impeachment trial of the Chief Executive. No absolute negative was given the Chief Executive over laws passd by Congress, but only a qualified veto.

After serving in the Convention with him for several months with full opportunity of observation and appraisal, Major William Peace of Georgia (H. Doc. 398, p. 101-2) says that Gouverneur Morris was a genius with talents that made him conscious, "But, with all these powers he is fickle and inconstant,—never pursuing one train of thinking, nor ever regular".

Mr. Morris quoted (1) says nothing at all about jurisdiction, which is an entirely different thing from judicial power, and (2) it says nothing whatever about the consent of a Sovereign State to suit.

The delegates did not regard the phrase "the judicial power shall extend," "to controversies to which the United States shall be a party", as conferring any such kind of jurisdiction over a Sovereign State. This is borne out affirmatively and clearly by the fact that the clause was adopted on August 27, 1787, while three days later, on August 30, Mr. Carroll moved to confer jurisdiction on the Supreme Court over conflicting claims of the Federal Government and the States "to the western territory". The inference which the Federal Government now seeks to draw is flatly inconsistent with the understanding of the Convention on August 30, 1787.

Another proposition often submitted to the Convention, but never adopted, which might have been construed to extend the jurisdiction of the Federal Courts to "controversies between the United States and any particular State" was the one included in the original Randolph or Virginia plan, to provide a National Judiciary with jurisdiction over "questions which may involve the national peace and harmony". (H. Doc. 398, p. 118, May 29, 1787). On June 13, (H. Doc. 398, p. 198) this provision and others in Resolution 9, were stricken out "in order to leave full run for organization". The same day the Committee of the Whole reported Resolution 9, back including that provision. On June 19, they resumed consideration of the Randolph plan as reported out again, with that provision in Resolution 13. (H. Doc. 398, p. 236) agreed upon.

On July 23, the Convention referred the Randolph plan to a Committee to prepare and report a Constitution and on August 6, Mr. Rutledge filed the Committee Report, (H. Doc. 398, p. 471) with Article XI providing for the Judiciary—(H. Doc. 398, p. 479). However, that broad provision granting peace and harmony", had been excluded,

and it was never suggested or resubmitted at any other time.

It is pertinent at this point again to quote from the cogent summary made by Mr. Justice Campbell in the case of *Florida* v. *Georgia*, 17 How. 478, 518:

> "There were before the Federal Convention propositions to extend the judicial powers to questions 'which involve the national peace and harmony'; 'to controversies between the United States and an individual state'; and in the modified form, 'to examine into and decide upon the claims of the United States and an individual state to territory'. None were incorporated into the Constitution, and the last was peremptorily rejected."

There is every reason to believe that the majority of the Court held the same view. See *post*, pp. 13-15.

Mr. Justice Campbell clearly identified the proposition that was peremptorily rejected, and that was accomplished on August 30, 1787 when the delegates defeated the amendatory motion of Mr. L. Martin to permit the Supreme Court to inquire into and decide upon claims of the United States and an individual state to territory.

The failure of the Convention to act upon the respective propositions of Mr. Pinckney, Mr. Rutledge, Mr. Paterson, and Mr. Carroll was tantamount to definite and lasting action, and this statement is accentuated by the gravity of the propositions and the number of times the Convention was urged to pass upon them.

Moreover, on August 30, 1787 the Convention took the most positive action on the proposition of Mr. L. Martin by actually voting to exclude it from the judiciary article.

The Federal Government now seeks to belittle the fact that the Convention failed to adopt the very proposal it now urges, by referring to the manner of rejection of the proposal as a "negative circumstance". We may indeed inquire just what sort of "negative circumstances" or re-

jection protocol, in the eyes of the Federal Government, would lend suitable formal dignity to the substantial fact, so clearly apparent, that the very proposal now urged by it was frequently urged to the Convention and failed of adoption. Does it contend that the failure of each proposal would be more effectively shown if proven by formal certificate, duly authenticated by Benjamin Franklin and the Convention officers? What, indeed, would such formal trappings add? Every failure of a proposal is a "negative circumstance"; and every such "negative circumstance" provides an affirmative rejection of the proposal made.

2. In Contrast to These Five Rejections of the Very Proposal Now Urged by it, the Federal Government Has Failed to Show Even a Scintilla in the Convention Record Which Supports Its Present Position.

The Federal Government endeavors to make something of a statement by Mr. Rutledge, and of one by Mr. James Wilson. However, neither statement provides any support for the proposal which it now urges.

The Federal Government quotes Mr. Rutledge as saying to the Convention on August 27, 1787: (Brief in Support of Motion, p. 17)

> "If the Supreme Court is to judge between the United States and particular states, this alone is an insuperable objection to the motion." (Emphasis added)

This statement was made three days before the Convention voted upon and rejected Mr. Martin's motion which would have extended the judicial power of this Court to examine into and decide upon claims of the United States and an individual state to territory or property.

This was the same Mr. Rutledge whose proposition to extend the judicial power to controversies between the United States and an individual state, made five days be-

forehand, on August 22, 1787, had not been acted upon. He knew, and so did all of the other delegates, that the proposition was then pending. That was why he couched his language in conditional terms. Moreover, three days later, on August 30, the proposition of Mr. L. Martin in modified form was rejected, 8 to 2, and that vote prevented Mr. Rutledge's "IF" from ever materializing.

The speech made by Honorable James Wilson before the Pennsylvania Convention (Brief in Support of Motion, pp. 17-18), quoted by the Federal Government, is absolutely irrelevant and has no bearing whatever on the question here involved. His speech was nothing more than the expression of individual opinion made to a State Convention. His State, Pennsylvania, had voted against the very proposal to give this Court jurisdiction over suits by the United States against a State claiming territory or property (H. Doc. 398, p. 645, 1 Elliott's Debates 275, 276). He was not construing the Constitution but magnifying his personal views through exhortation. Moreover, Mr. Wilson was talking about whether this Court would have jurisdiction in the reverse situation, that is, when a state sues the United States. Thus, he says in effect that as a "*suiter*" against the United States, a state as a Plaintiff must acknowledge this Court's jurisdiction.

While we have no quarrel with that rule, it simply has no bearing whatever on our question.

3. The Decisions Anteceding the Texas Case Strongly Confirm that the States Have Not Consented to be Sued by the Federal Government at Its Pleasure.

In reading the early decisions of this Court on the judiciary article, one is forcefully struck by the insistence of this Court on the letter of the Constitution to determine (1) the inclusion in the judiciary article of the parties involved, and (2) the consent to be sued.

The iron-bound rule that the jurisdiction of this Court depends strictly upon the language of the Constitution is

clearly stated in *Rhode Island* v. *Massachusetts* (1838) 12 Peters 657, page 720, as follows:

> "But as this Court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies, and parties over which the Constitution and laws have authorized it to act, any proceeding without the limits prescribed is *coram non judice*, and its action a nullity. 10 Peters, 474; S. P. 4 Russ. 415. And whether the want or excess of power is objected by a party or is apparent to the Court, it must surcease its action or proceed extrajudicially."

Again, we observe the stress placed upon the letter of the Constitution in the case of *Chisholm* v. *Georgia*, 2 U. S. 2 Dall. 419 (1793). Mr. Justice Iredell made the following statement therein, at page 431:

> "The Constitution is particular in expressing the parties who may be the objects of the jurisdiction in any of these cases."

And Mr. Justice Cushing made the following potent observation, page 469:

> "When speaking of the United States, the Constitution says 'controversies to which the United States shall be a party', *not* controversies *between* the United States and any of their citizens. When speaking of states, it says 'controversies between two or more states'; '*between* a state and citizens of another state'." (Emphasis added)

In the case of *Marbury* v. *Madison*, 5 U. S. 1 Cranch 137, (1803), motion was made for mandamus against the Secretary of State to issue certain Commissions. This necessitated an inquiry into the judiciary article. At page 178 the Court said:

> "Those, then, who controvert the principle that the Constitution is to be considered, in Court, as a paramount law, are reduced to the necessity of maintaining

that Courts must close their eyes on the Constitution. * * * "

"The judicial power of the United States is extended to all cases arising under the Constitution."

"Could it be the intention of those who gave this power, to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?"

In a number of cases, including *The Davis,* 77 U. S. 10 Wall. 15; and *Hans* v. *Louisiana,* 134 U. S. 1, this Court was confronted with the question of ascertaining whether the real parties-defendant were states or the individual officers of states, and this distinction was important to the Court for the reason that, if the states were the real parties-defendant, inquiry had to be made into their consent to be sued. Thus in *Hans* v. *Louisiana* the Court cogently pointed out: (p. 16)

"The suability of a state without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. . . ."

On the proposition that a state is not suable except by its own consent, Mr. Chief Justice Marshall in *Cohens* v. *Virginia,* (1821) 19 U. S. (6 Wheat.) 262, said (p. 380):

"This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a state has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion, *depends on the instrument by which the surrender is made.*" (Emphasis added).

In *Beers* v. *Arkansas,* (1857) 20 How. 527, Chief Justice Taney, organ of the Court, among other things, said, p. 529:

"It is an established principle of jurisprudence in all civilized nations that the sovereign can not be sued

in its own Courts, or in any other, without its consent and permission. . . ."

This requirement of express consent of a State to be sued by the United States is also found in the case of *Florida* v. *Georgia*, 17 How. 478 (1854). Therein the State of Florida had brought suit against the State of Georgia to establish a boundary between them. The Attorney General moved to intervene on behalf of the United States. It was held that the Attorney General could intervene on behalf of the United States in certain limited respects without making the United States a party.

The Attorney General knew that the United States could not become a party to the suit without the consent of the two states involved, and that was why he was trying to keep the United States out of the controversy as a party and to persuade the Court not to consider his motion as an application to intervene in the technical sense of that term. Indeed, in his brief, the Attorney General freely and categorically admitted that **"The Court is not empowered by the Constitution to entertain an original suit between the United States and a State or the United States and two States"**. (15 L. Ed. 184) Hence, the statement made by the Federal Government in its Brief in Support of Motion, p. 8, that "there is nothing in the case which holds that the United States could not have been made a party" is flagrantly in error.

The minority justices were adamant in the view that the allowance of the intervention, though limited in scope, would cause the United States to become a party, and that was why they rendered such a vigorous dissent to show that, under the Constitution, the United States could not be made a party to a controversy in which it would oppose the States without their consent. Moreover, the majority showed its agreement that the United States could not sue a State without its consent by stating plainly:

"... it is manifest * * * that the United States have a deep interest in the decision of this controversy.

> And if this case is decided adversely to their rights, they are without remedy; and there is no form of proceeding in which they could have that decision revised in this Court or anywhere else." * * *
>
> "In the case like the one now before us, there is no necessity for a judgment against the United States. For when the boundary in question shall be ascertained and determined by the judgment of the Court, in the present suit, there is no possible mode by which that decision can be reviewed or re-examined at the instance of the United States". * * * (P. 493)
>
> "But under our government, a boundary between two States may become a judicial question, to be decided in this Court. And when it assumes that form, the assent or dissent of the United States cannot influence the decision. The question is to be decided upon the evidence adduced to the Court; and that decision, when pronounced, is conclusive upon the United States, as well as upon the States that are parties to the suit." (p. 495).

Accordingly the following statement in Mr. Justice Campbell's opinion (p. 518) must be also understood as the view of the majority:

> ". . . it was not in the design of the Constitution to alter or even modify the existing relations of any of the sovereign parties named in this article, to legal jurisdictions, by enlarging their liableness to suit; but its purpose was to erect tribunals to which they might resort for the determination of the suits which they might legally commence, or might voluntarily submit or were subject to, according to their pre-existing conditions. Thus no suit can be commenced against the United States, foreign states or ambassadors, and public ministers; nor are they brought within the jurisdiction of the Courts of the United States to any degree beyond that to which they were liable, without this constitutional clause. The construction which allows the exemption of these parties as sovereigns, or their representatives, to operate, sanctions also the title of the states to the same right, for they are mentioned in the same clause; and the jurisdiction conceded to this Court in reference to them is expressed in similar or identical language."

The same is true of the dissenting opinion of Mr. Justice Curtis, p. 507:

> "It must be remembered, also, that a state can be sued only by its own consent. This consent has been given in the Constitution; but only in cases having such parties as are there described. The particular character of the parties to the controversy, into which a state has consented to enter, constitutes not only an essential element in that consent, but it is the sole description of what is agreed to. The State of Georgia has consented to be sued by one or more States, or by foreign States, and by no other person or body politic. The State of Georgia has consented to stand joined as a defendant with one or more states, or with a foreign state, and with citizens or subjects of a state other than the one bringing the suit, but with no other person or body politic. Certainly there is no power existing in this government to enlarge that consent so as to embrace in it anything to which it does not, by its terms, extend."

It is of some significance to bear in mind that Mr. Chief Justice Taney who rendered the majority opinion in this case was also the organ of the Court in the case of *Beers* v. *Arkansas, supra*, referred to above, in which it was held that ". . . the sovereign may not be sued in its own Courts, or in any other, without its consent and permission. . . ."

There is no valid reason to include in this analysis, the case of *United States* v. *North Carolina*, 136 U. S. 211 (1889), except that it was largely relied upon by the Court in deciding the case of *United States* v. *Texas*, 143 U. S. 621 (1891). This suit was brought by the United States against the State of North Carolina to recover interest on state bonds. The question of the state's immunity to a suit brought by the United States was not even raised, and the State entered a general appearance. It settled nothing so far as the question of the right of the United States to sue an individual state without its consent is concerned, and

has no bearing on this case in which Louisiana does not consent to be sued.

Where a State files a general appearance it submits voluntarily to the jurisdiction of the Court and grants its consent to be sued. *Clark* v. *Barnard*, 108 U. S. 436.

Summary of the Pre-Texas Period: Thus, the decisions of this Court, anteceding the *Texas* case, fully recognized (1) that the states surrendered only a portion of their immunity to suit; (2) that the portion surrendered may only be found in the Constitution; (3) that their consent to suit must be express, and may be given by a general appearance; and (4) that a suit may not be brought by the United States against an individual state without its consent.

4. The Texas Case is Not at All a Precedent Supporting the Position of Federal Government.

This suit was an original action brought in this Court against the State of Texas to settle a boundary dispute. One of the jurisdictional issues resulted from the contention made that it was not competent for the United States to sue a state in its own Court, especially in a controversy over the ownership of property. The Court resolved that issue by taking jurisdiction. It is specially noteworthy that Chief Justice Fuller dissented and fifteen years later wrote the opinion in *Kansas* v. *United States* which utterly shattered the reasoning of the *Texas* case.

The following quotations from the decision of the Court in the *Texas* case suffice for our analysis:

> "Did they (the framers of the Constitution) omit to provide for the judicial determination of controversies arising between the United States and one or more of the States of the Union? This question is in effect answered by *United States* v. *North Carolina*, 136 U. S. 211 . . . It is true that no question was made as to the jurisdiction of this Court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the Court, and the judgment

would not have been rendered except upon the theory that this Court has original jurisdiction of a suit by the United States against a state. . . ." (p. 642)

"We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign states, intended to exempt a state altogether from suit by the general government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the states, and that the permanence of the Union might be endangered if to some tribunal was not entrusted the power to determine them according to the recognized principles of law. . . ." (p. 644)

"**The submission to judicial solution of controversies arising between these two governments,** 'each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other' (*McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 316, 410) **but both subject to the supreme law of the land,** does no violence to the inherent nature of sovereignty . . . ." (p. 646)

The following inherent errors and points of weakness are found in the decision:

1. It does not follow the earlier decisions of this Court.

2. It relies upon the case of *United States* v. *North Carolina*, *supra*, for support, while recognizing that the jurisdictional issue was not raised in that case, that there North Carolina consented to be sued, and that the Court said nothing on the subject.

3. Admitting that the *North Carolina* case did not involve the issue, it undertakes to surmise and speculate as to what was on the mind of the Court in that case, and relies upon that conjecture.

4. It *assumes* that, because the jurisdictional point was important in 1892, the Constitutional Convention could not have overlooked it in 1787, and that the framers of the Constitution did not intend to exempt a State from suit by the Federal Government. In other words,

since the court felt that jurisdiction should have been conferred in such cases, it **assumed** that it was conferred, even though it was not conferred.

5. Its findings were made and conclusions reached *dehors* the letter of the Constitution, and the decision is not interpretation but pure and unadulterated *assumption.*

Here, let us remember the solemn admonition of Chief Justice Marshall, regarding jurisdiction:

> "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." *Cohens* v. *Virginia*, 6 Wheat 262, 404.

Standing alone, the *Texas* case has no basis whatever in the Constitution or in authority, and should be carefully re-examined. But, as we will show later, its reasoning has been irretrievably shattered by *Kansas* v. *United States* and, hence it has no force whatever as a precedent.

5. The Decisions Following the Texas Case Also Fail to Support the Federal Government.

We can dispense instanter with a number of cases, for in them the jurisdictional issue was not raised or even mentioned, because in those cases the States consented to be sued by entering general appearances, *United States* v. *Alabama*, 313 U. S. 274 (1941); *United States* v. *Arizona*, 295 U. S. 174 (1935); *United States* v. *Louisiana*, 318 U. S. 743; *United States* v. *Michigan*, 190 U. S. 378 (1902); *United States* v. *Minnesota*, 270 U. S. 181 (1925); *United States* v. *Oklahoma*, 261 U. S. 253 (1922); *United States* v. *Oregon*, 295 U. S. 1 (1935); *United States* v. *Utah*, 283 U. S. 64 (1930); *United States* v. *California*, 332 U. S. 19 (1947); *Oklahoma* v. *Texas*, 252 U. S. 372 (1920); and *United States* v. *Wyoming*, 331 U. S. 440 (1945).

The Court elaborated to some extent on the jurisdictional question in the case of *United States* v. *West Virginia* (1935), 295 U. S. 463, but there also the State did not refuse its consent to be sued.

Where a State files a general appearance it submits voluntarily to the jurisdiction of the Court and grants its consent to be sued. *Clark* v. *Barnard*, 108 U. S. 436.

Moreover, just as the United States may sue a State with the State's consent, a State may sue the United States with the consent of the United States. *New York* v. *United States*, 326 U. S. 572, *Arizona* v. *California*, 283 U. S. 423; *Minnesota* v. *Hitchcock*, 185 U. S. 373. *United States* v. *Louisiana*, 123 U. S. 32.

When we come to *Kansas* v. *United States*, (1904) 204 U. S. 331, where the United States did not consent, we find that counsel for Kansas based their case entirely on the *Texas* case, (51 L. Ed. 511). But the opinion in the *Kansas* case was written by Mr. Chief Justice Fuller, who had dissented in the *Texas* case. Having completely disagreed with the *Texas* case, his opinion in the *Kansas* case simply extinguished the *Texas* case as a precedent. Moreover, when the opinion states that "public policy" forbids the conclusion that the United States may be sued by a State without its consent, we can only understand this as a reference to the Constitution itself. The only "public policy" governing relations between the Federal Government and the States, is the language of the Constitution; and the Constitution does not give the consent of either the Federal Government or the States to be sued by the other branch. The upshot of all this is that in *Kansas* v. *United States*, the Court, in substance, returned to the Constitution and absolutely extinguished the *Texas* case as a precedent.

The striking character of *Kansas* v. *United States*, as a complete repudiation of the *Texas* case is all the more apparent when we consider that, in addition to the Chief Justice, only two of the Justices who decided the *Texas*

case were on the Court when *Kansas* v. *United States* was decided fifteen years later. Six new judges had, meanwhile, been added; and the thinking of the Court had so completely changed that the decision in *Kansas* v. *United States* was unanimous, except that Mr. Justice Moody, who had been appointed after the case had been submitted and before decision, did not participate.

Mr. Chief Justice Hughes was the organ of the Court in the case of *Monaco* v. *Mississippi*, 292 U. S. 313 (1933) which held that a foreign state could not sue a State of the Union without its consent. There is even less reason to believe that the United States may sue a State than that a foreign state may do so, for controversies between States and a foreign state are specifically mentioned in the Constitution, while those between the Federal Government and a State were specifically omitted (Point 1, *ante*, p. 2).

Then, resorting to assumption, as distinguished from the letter of the Constitution, the Court's opinion in the *Monaco* case observes as dictum on p. 329:

> "Upon a similar basis rests the jurisdiction of this Court of a suit by the United States against a State, albeit without the consent of the latter. While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the Constitutional plan."

This must be taken as a clear admission that the Constitution itself confers no such jurisdiction. And it is impossible to reconcile the statement quoted with those made by the Court in *Marbury* v. *Madison; Cohens* v. *Virginia; Chisholm* v. *Georgia; Beers* v. *Arkansas,* and *Hans* v. *Louisiana* in which stress was placed upon the express language of the document which, alone, could determine the surrender *vel non* of a state's immunity to suit in given cases. Indeed, this reference to the *Texas* case by Mr. Chief Justice Hughes was the most charitable which he could make.

The final and rather horrifying conclusion to be drawn from the *Texas* case is that it departed from the words of the Constitution and indulged in sheer assumption—a process contrary to the very concept of Constitutional law. And the *Texas* case having been irretrievably crushed by *Kansas* v. *United States*, there is no decision of this Court supporting the position of the Federal Government.

6. The Immunity of Louisiana to Suit by the Federal Government is Exactly Equal to the Immunity of the Federal Government to Suit by Louisiana, and the Federal Government Has Shown No Authority Whatever to the Contrary.

Perhaps the most significant part of the brief of the Federal Government is the casual section on page 10 thereof in which it attempts to reply to what we have described as the shattering effect of *Kansas* v. *United States* on the reasoning of the *Texas* case. Here the Federal Government admits that in the *Texas* case the Court observed that the Federal and State Governments are "both subject to the supreme law of the land". And it does not deny that the entire foundation of reasoning of the *Texas* case is the theory of mutuality, that is, that as part of the Constitutional plan, both Federal and State Governments were considered to have consented to be sued by the other. Nor does it specifically deny that the *Texas* case theory of mutuality, upon which Kansas relied, was irretrievably crushed by the decision in *Kansas* v. *United States*.

Indeed, in substance we now find that the Federal Government has actually abandoned the theory of mutuality of the *Texas* case and taken the position that the Federal Government should be able to sue a state at its pleasure, without the reverse being true, on the authority of a single case, now cited for the first time. It now states that "the respective governments [do not] occupy the same position insofar as immunity to suit from the other may be con-

cerned", because "a suit between the United States and a State 'is not controversy between equals' ", citing the lone case of *Sanitary District* v. *United States*, 266 U. S. 405!

Here indeed do we come to the crux of this case. Does the Federal Government have some greater immunity to suit by Louisiana than Louisiana has to suit by the Federal Government?

To this question we must answer that as far as immunity to suit is concerned, all sovereigns are juridically equal. *Monaco* v. *Mississippi*, 293 U. S. 313. *The Exchange*, 7 Cranch 116; *The Parlement Belge*, L. R. 5 P. S. 197, *Berizzi Bros.* v. *The Pesaro*, 271 U. S. 562. And there is nothing in the Constitution giving either the Federal Government or the State Governments an immunity to suit greater than that of the other. **So far as immunity to suit by the other is concerned, the sovereignties of the two governments are exactly equal.** Also, the sovereignty of the States can be no more invaded by the Federal Government than the action of the State governments can arrest or obstruct the course of the national power. *New York* v. *United States*, 326 U. S. 572; *United States* v. *Texas*, (1892) 143 U. S. 621; *Worchester* v. *Georgia*, (1832) 6 Pet. 520, 8 L. Ed. 483; *Collector* v. *Day*, (1871) 11 Wall. 113, 20 L. Ed. 122; *Texas* v. *White*, (1869) 7 Wall. 700, 725, 19 L. Ed. 227; *United States* v. *Cruikshank*, (1876) 92 U. S. 550, 23 L. Ed. 588; *McCulloch* v. *Maryland*, 4 Wheat 316.

As was said in *Collector* v. *Day*, 11 Wall. 113, 124, in discussing the general equality of the federal and state sovereigns,

> "The supremacy of the general government * * * cannot be maintained. The two governments are upon an equality * * * ."

This juridical equality with respect to immunity to suit is not affected by, and must not be confused with, differences in physical power of governments. Today the United

States has mighty battleships, an air force of almost incredible striking power, and tremendous military strength. The little Republic of Costa Rica does not even maintain a standing army, navy or air force. But this does not mean that Costa Rica has an inferior juridical standing as a sovereign, or fewer legal rights as such under international law, than its powerful neighbor to the north. Indeed, we may confidently say that the United States never has, and never would, assert in either litigation or in international relations that Costa Rica has less integrity as a sovereign under the law, or as a sovereign any less immunity from suit than the United States.

Also, the juridical equality of the Federal and State governments with respect to immunity to suit is not affected by the various grants of regulatory power in the Constitution. In the Constitution the states and the Federal Government have consented that each is to have superior regulatory power in certain fields. Thus, in the field of interstate commerce, the Federal Government has a regulatory power superior to that of the States. Conversely, in the field of the purely internal affairs of the States, the State police power is supreme. These respective supremacies, in various fields of regulatory power, however, have no bearing whatever on the juridical equality of the two sovereigns with respect to immunity to suit. The Constitution contains no provision for diminution of the immunity to suit of either government, and the immunity of each sovereign to suit by the other, is of the same precisely-identical and unvarying equality.

Moreover, the utter lack of substance of the Federal Government's contention that Louisiana must be relegated to an immunity to suit inferior to that of the Federal Government, is shown by the fact that it attempts to bottom that extraordinary contention solely and entirely on the single case of *Sanitary District* v. *United States*, 266 U. S. 405. Except for that case, the Federal Government does not even pretend to deny that all sovereigns are juridically

equal with respect to immunity to suit, and that immunity to suit is an attribute of sovereignty which has an absolutely-unvarying quality.

The *Sanitary District* case, however, does not have the slightest relevance to this question of immunity to suit. In that case the United States sued an Illinois corporation which had no claim whatever to sovereign immunity, seeking to enjoin certain diversion of water from Lake Michigan. The defendant corporation had been clothed with certain statutory power of the State, and the Court merely held, so far as here material, that the powers of the Federal Government to regulate interstate commerce and to carry out treaty obligations to a foreign power, were superior to those of the State. We have no quarrel with that case. We have no doubt that, in a controversy over regulation of interstate commerce, a contest between Federal and State governments is not a contest between equals. Similarly, a contest between Federal and State governments over regulation of a purely internal affair of the State, is also not a contest between equals. While the Federal Government has superior power under our Constitution to regulate interstate commerce, the States have superior power to regulate their internal affairs. But so far as immunity to suit is concerned, the sovereigns are juridically equal and the contest is inherently and fundamentally one between equals.

In Summary on this Point: The Federal Government does not deny that the theory of the *Texas* case is one of mutuality, that is, that under the Constitutional plan, the two branches were said to have each consented to be sued by the other. Nor does it really deny that the theory of mutuality, the entire foundation of reasoning in the *Texas* case, was irretrievably crushed by *Kansas* v. *United States*, which held that a State could not sue the Federal Government without its consent. Now the Federal Government actually abandons the *Texas* case and its theory of mutu-

ality and merely assumes the point by asserting that it is entitled under the law to some greater or superior degree of immunity to suit, than a State Government. The utter emptiness of that assertion is shown by the fact that it is bottomed solely on the *Sanitary District* case, a case which simply has no application whatever. Moreover, this assertion flies squarely in the face of the great doctrine of the juridical equality of sovereigns, and the unvarying classic quality of that immunity to suit which is an inherent attribute of sovereignty. There are not two or more grades of sovereign immunity; there is only the single grade, and it is an attribute of sovereignty of the State of Louisiana.

We have been living in an era when it has been fashionable in political circles to talk about the great physical power and resources of the Federal Government, and to deprecate the economic usefulness of the States. But economic differences, whatever they may be, do not provide a basis for legal discrimination with respect to immunity to suit. The rich and powerful are not entitled, under our legal system, to greater or superior immunity to suit, simply because they are economically or physically more powerful. On the contrary, so far at least, we seek equal justice under law, a principle which in our system is as applicable to State Sovereigns as to individuals, and which must be maintained to preserve our dual system of government.

7. There is No Presumption of Consent by a Sovereign to Suit; on the Contrary, the Presumption is Rigorously Against the Granting of Such Consent and Any Consent Granted Must Be Restricted to Its Terms.

It is apparent from the foregoing that no Sovereign can ever be presumed to have consented to suit, and that on the contrary the presumption is against the granting of consent, except where it has been granted in clear and unambiguous terms. For this reason, whenever a Sovereign consents to be sued, the consent must be restricted to its

terms, as to persons, courts, and procedure. *Ford Motor Co.* v. *Department of Treasury of State of Indiana* (1945) 323 U. S. 459, 89 L. Ed. 389, 65 S. Ct. 347; *Great Northern Life Ins. Co.* v. *Read* (1944) 322 U. S. 47, 88 L. Ed. 1121, 64 S. Ct. 873; *Cohens* v. *Virginia*, 6 Wheat. 262, *Hans* v. *Louisiana*, 134 U. S. 1; *Curran* v. *Arkansas*, 56 U. S. 15 How. 304; *Beers* v. *Arkansas* (1858) 20 How. 527.

This principle summarizes Louisiana's position. Louisiana is a Sovereign State which may not be sued without its consent and which very clearly has not consented to be sued in any document, anywhere, or otherwise; hence, this Court simply does not have jurisdiction over Louisiana, and the motion of the Federal Government should be denied.

Respectfully submitted,

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana,

JOHN L. MADDEN,
Assistant Attorney General, State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.,
Of Counsel.

Appearing specially for the sole and only purpose of opposing this Motion.

April 1949.

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Supreme Court of the United States

October Term, [illegible] 51

No. [illegible], Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

PETITION FOR REHEARING.

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General, State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.
Of Counsel.

Appearing specially for the sole and only purpose of opposing the motion for leave to file a complaint against Louisiana.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

Supreme Court of the United States

October Term, 1948.

No. 13, Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

PETITION FOR REHEARING.

Comes now the State of Louisiana and, on the contingency set forth hereinafter, petitions the Court for a rehearing of its decision granting the motion of the Federal Government for leave to file a complaint herein, and in support thereof shows:

1. This Court Granted the Motion "Of Course" and Did Not Decide the Question of Jurisdiction Over Louisiana.

The Court's decision of the motion is stated as follows:

> "The motions for leave to file complaints are granted and process is ordered to issue returnable on or before September 1, next. Mr. Justice Jackson took no part in the consideration or decision of these applications."

Since no opinion was written nor authority cited, it seems clear that it was not the intention of the Court in the one-

line statement to decide the important question of jurisdiction over Louisiana as a party to the proposed lawsuit, a question that goes to the vitals of our dual system of government. Indeed, the previous decisions of this Court establish clearly and without ambiguity that the accepted practice on such questions of jurisdiction is to grant the motion for leave to file "of course", postponing the question of jurisdiction until after process has issued.

In *Washington* v. *Northern Securities Company* (1902), 185 U. S. 254, the State of Washington sought leave to file a complaint against various defendants, notice was given to the defendants, and oral argument was had in which the defendants opposed the motion on jurisdictional grounds. Nevertheless, the motion was granted, the Court saying that **"Ordinarily . . . the motion for leave to file is granted as matter of course."**

The opinion of Chief Justice Fuller, among other things, says:

> "This is an application by the state of Washington for leave to file an original bill in this court against the Northern Securities Company, a corporation of New Jersey; the Great Northern Railway Company, a corporation of Minnesota; and the Northern Pacific Railway Company, a corporation of Wisconsin. Notice was given to the proposed defendants, and argument had in support of and against the motion. The usual practice in equity cases has been to hear such applications *ex parte* (*Georgia* v. *Grant*, 6 Wall. 241, 18 L. Ed. 848), although under special circumstances a different course has been pursued. *Mississippi* v. *Johnson*, 4 Wall. 475, 18 L. Ed. 437. Ordinarily, as stated by the chief justice in the latter case, the motion for leave to file is granted as matter of course. 4 Wall. 478, 18 L. Ed. 438."
>
> * * * * * * * * *
>
> "In *Louisiana* v. *Texas*, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251, the case stated shows that 'argument was had on objections to granting leave, but it appearing to the court the better course in this in-

stance, leave was granted, and the bill filed, whereupon defendants demurred, and the cause was submitted on the oral argument already had and printed briefs.'

"In *Minnesota* v. *Northern Securities Co.* (decided at this term) 184 U. S. 199, ante, 499, 22 Sup. Ct. Rep. 308, application to file a similar bill to that before us, and seeking similar relief, was made, and after examining the bill we directed notice to be given, and heard argument on both sides. The result was that leave to file was denied because of the want of certain indispensable parties, who could not be brought in without defeating our constitutional jurisdiction. That insuperable difficulty does not meet us on the threshold here, but among other objections to granting leave, it is urged that the court would have no jurisdiction over the subject-matter because, as contended, the bill does not present the case of a controversy of a civil nature which is justiciable under the Constitution and laws of the United States, in that the suit is purely a suit for the enforcement of 'the local law and policy of a sovereign and independent state, whose right to make laws and to enforce them exists only within itself and by means of its own agencies, and is limited to its own territory.'

"In the exercise of original jurisdiction the court has always necessarily proceeded with the utmost care and deliberation, and, in respect of all contested questions, on the fullest argument; and in the matter of practice we are obliged to bear in mind, in an especial degree, the effect of every step taken in the instant case on those which may succeed it. In view of this it seems to us advisable to take the same course on the pending application as was pursued in *Louisiana* v. *Texas:* that is, **without intimating any opinion whatever on the questions suggested, to grant leave to file in accordance with the usual practice.** Our rules require service sixty days before the return day of process, but as the final adjournment of the term will have taken place within that time, process will be made returnable on the first day of next term. (Emphasis added.)

"Leave is granted and process will issue accordingly."

The same thing happened in *Louisiana* v. *Texas* (1900), 176 U. S. 1. Oral argument was had on objections to the jurisdiction of this Court on the motion for leave to file a complaint, but the Motion was granted, whereupon the defendants raised the jurisdictional grounds by demurrer, and the complaint was then dismissed for lack of jurisdiction.

The logic of these decisions is specially applicable to the present motion, inasmuch as at the time of granting the motion for leave to file process had not issued; Louisiana was not a purported party to the proposed lawsuit, in any sense whatever, and thus this Court had not in any sense attempted to subject Louisiana to its jurisdiction. From the standpoint of the mechanics of litigation, Louisiana cannot properly assert lack of consent to be sued until after service of process purports to subject her to suit. Until then, the issue of jurisdiction over Louisiana as a party is not before the Court.

2. No Answer Has Yet Been Suggested to Louisiana's Basic Arguments.

We do not believe this Court could have intended to decide the question of jurisdiction on the motion, for the additional reason that, on a question of such magnitude, there has not been any suggestion of an answer to Louisiana's basic arguments. These are:

A. Except for Suits Between States, the Constitution Does Not Provide for Suit Against a State Without Its Consent.

1. In the original jurisdiction of this Court: *Duhne* v. *New Jersey*, 251 U. S. 311, *Monaco* v. *Mississippi*, 292 U.S. 313. See our brief, p. 2.

The *Duhne* case held that a State could not be sued without its consent *in this Court*, by an individual. It also held that Article III, Section 2, Clause 2, did not grant the consent of a State to be sued in the original jurisdiction

of this Court. The opinion of Mr. Chief Justice White, among other things, said:

> "It is urged, however, that although this may be the general rule, it is not true as to the original jurisdiction of this court, since the second clause of Sec. 2, article 3, of the Constitution, confers original jurisdiction upon this court 'in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, . . .' In other words the argument is that the effect of the clause referred to is to devest every state of an essential attribute of its sovereignty by subjecting it without its consent to be sued in every case if only the suit is originally brought in this court. Here again the error arises from treating the language of the clause as creative of jurisdiction instead of confining it to its merely distributive significance according to the rule long since announced, as follows: 'This second clause distributes the jurisdiction conferred in the previous one into original and appellate jurisdiction, but does not profess to confer any. The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties, and those only.'' *Louisiana* v. *Texas* 176, U. S. 1, 16, 44 L. ed. 347, 353, 20 Sup. Ct. Rep. 251. That is to say, the fallacy of the contention consists in overlooking the fact that the distribution which the clause makes relates solely to the grounds of Federal jurisdiction previously conferred, and hence solely deals with cases in which the original jurisdiction of this court may be resorted to in the exercise of the judicial power as previously given. In fact, in view of the rule now so well settled as to be elementary, that **the Federal jurisdiction does not embrace the power to entertain a suit brought against a state without its consent**, the contention now insisted upon comes to the proposition that the clause relied upon provides for the exercise by this court of original jurisdiction in a case where no Federal judicial power is conferred." (Emphasis added.)

If the clause of Article III, section 2, clause 2, "all cases . . . . in which a State shall be party . . . ." did not grant

the consent of a State to be sued in this Court by an individual, it certainly did not grant the consent of a State to be sued in this court by the Federal Government.

Especially is this undeniable since five times the Constitutional Convention declined to give this Court jurisdiction of controversies between the United States and any particular State. See our brief, pages 2-4, and 8.

Moreover, the clear fact that the Constitution does not entitle the Federal Government to sue an individual in the original jurisdiction of this Court must be considered. In view of the jealousy of the States toward the newly-created Federal Government at the time of drafting the Constitution, we must remember that the Founding Fathers never intended to subject their own States, without their consent, to suit by the Federal Government, more readily than individuals were to be subjected to such suit. This confirms that the Founding Fathers never intended to empower the Federal Government to sue a State without its consent.

2. By a Foreign State: *Monaco* v. *Mississippi*, 292 U. S. 313.

3. By an Individual: *Duhne* v. *New Jersey*, 251 U. S. 311; *Hans* v. *Louisiana*, 134 U. S. 1.

4. By a Corporation: *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47; *Smith* v. *Reeves*, 178 U. S. 436.

B. No Consent Can be Assumed From the Texas Case.

Assuming that the *Texas* case enunciated, *de hors* the Constitution, a theory of mutuality, that is, that the Founding Fathers, in their turn, had assumed that both the Federal Government and the States had consented to be sued by the other branch, that theory of mutuality has been irretrievably crushed by *Kansas* v. *United States*, 204 U. S. 331, and *Duhne* v. *New Jersey*, 251 U. S. 311. The *Kansas* case held that the Federal Government may not

be sued by a State without its consent in the original jurisdiction of this Court. The *Duhne* case, *supra*, held that Article III, section 2, clause 2, did not grant the consent of a State to be sued in this Court.

C. So Far as Immunity to Suit is Concerned, the State and Federal Governments Are Exactly Equal.

This argument, set forth on page 21 of our brief, has not been answered, and we know of no answer that can be made to it.

CONCLUSION.

The question of jurisdiction of this Court over Louisiana as a party was not presented as an issue to this Court, on the motion for leave to file a complaint against Louisiana, because nothing had been done to attempt to subject Louisiana to the jurisdiction of this Court. Hence, this Court granted the motion more or less "of course". The question of jurisdiction over Louisiana can only be raised by motion after process is served on Louisiana.

On the foregoing basis the petition for rehearing should be denied. But if this Court should be further interested in the question of jurisdiction at this time, then the petition for rehearing should be granted, and the cause should be immediately restored to the docket for reargument at this term, in order to explore to the full this question,

which is of such great importance to the States and to the Nation.

Respectfully submitted,

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.
JOHN L. MADDEN,
Assistant Attorney General, State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.
Of Counsel.

Appearing specially for the sole and only purpose of opposing the motion for leave to file a complaint against Louisiana.

May, 1949.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing Petition for a rehearing is presented in good faith and not for delay.

BOLIVAR E. KEMP, JR.,
Attorney General of Louisiana.

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 12, Original

UNITED STATES OF AMERICA, *Plaintiff*

v.

STATE OF LOUISIANA

DEMURRER,

OR

MOTION TO DISMISS ON JURISDICTIONAL GROUNDS, AND CONDITIONAL MOTIONS.

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General
State of Louisiana.

L. H. PEREZ,
New Orleans, La.,

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.,
Of Counsel.

Appearing Specially.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 12, Original

UNITED STATES OF AMERICA, *Plaintiff*

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OR

MOTION TO DISMISS ON JURISDICTIONAL GROUNDS.

Now comes the State of Louisiana, through its Attorney General, and with full reservation of all rights under the objections heretofore filed to the granting of leave for the filing of the bill of complaint herein, now moves to dismiss the bill of complaint herein filed by the United States of America against the State of Louisiana, for the following reasons and causes:

I.

That the Supreme Court of the United States does not have original jurisdiction over any controversy between the United States of America and the State of Louisiana, under Article III, Section 2, Clause 2 of the Constitution of the United States, or under any other provision of the

Constitution of the United States, and, therefore, this Court does not have original jurisdiction of the parties herein, or of the subject matter presented by the bill filed herein by the United States.

II.

In the alternative, defendant, State of Louisiana, shows that it has objected to be sued, and that it has not consented to be sued by the United States of America herein, and this Court does not have jurisdiction *ratione personae*.

WHEREFORE, the premises considered, the State of Louisiana prays that the first ground of its demurrer or motion to dismiss, set out in paragraph I above, be sustained; that in the event the Court should overrule the first ground of defendant's motion, set out in paragraph I above, then in the alternative, defendant prays that the alternative ground of its motion to dismiss, set out in paragraph II above, be sustained; and that the complaint of the United States of America against the State of Louisiana herein be dismissed.

Oral argument is requested.

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General
State of Louisiana.

L. H. PEREZ,
New Orleans, La.,

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.,
Of Counsel.

Appearing Specially.

STATEMENT IN SUPPORT OF MOTION TO DISMISS ON JURISDICTIONAL GROUNDS.

I.

This Court Has No Jurisdiction Over a Controversy Between the Federal Government and a State.

This Court granted leave to the United States of America to file a bill of complaint herein against the State of Louisiana. The bill of complaint was filed and the State of Louisiana was served with subpoena to answer thereto.

By the filing of the bill and the service of subpoena against the State of Louisana, it is sought to subject the State of Louisiana to the original jurisdiction of this Court.

It must be conceded that if it were not for the existence of the Constitution of the United States, there would be no judicial power to be exercised by the United States, nor would there be a Supreme Court of the United States, because it is the Constitution of the United States which brought into being both the judicial power and the very existence of this Court.

The record of the Constitutional Convention, which wrote the Constitution of the United States, is sufficiently extant for authoritative reference as to what judicial power was granted to the United States and what original jurisdiction was conferred upon the Supreme Court of the United States, as well as to what judicial power and jurisdiction were denied to the United States and to this Court.

First: On June 17, 1787, the Convention had before it the Paterson Plan (H. Doc. 398, 69th Cong.; 1st Session; pp. 769 and 973; 1 Elliott's Debates, p, 177).

Included in the plan was a striking recommendation which read as follows:

> "Provision ought to be made for hearing and deciding upon all disputes arising between the United States and an individual state, respecting territory."

On June 19, 1787, *the Convention adopted a motion* by a vote of 7 to 3, 1 state divided, *to reject the Paterson Plan.* This rejection included the above proposition. (1 Elliott's Debates 180).

Second: Mr. Pinckney submittted several propositions to the Convention on August 20, 1787, and they were referred to the Committee of Detail. One of the propositions reads as follows:

> "The jurisdiction of the Supreme Court shall be extended to all controversies between the United States and an individual state; or the United States and the citizens of an individual state" (the Madison Papers, Vol. III, p. 1366; H. Doc. 398, 69th Cong.; 1st Sess.; p. 572).

No action was taken on the proposition.

Third: On August 22, 1787 Mr. Rutledge for the Committee of Detail, submitted a report to the Convention, suggesting the following amendment to the Randolph or Virginia Plan, then before the Convention:

> "Between the fourth and fifth lines of the third section of the eleventh article, after the word 'controversies', insert 'between the United States and an individual state, or the United States and an individual person'" (The Madison Papers, Vol. III, p. 1399; H. Doc. 398, 69th Cong.; 1st Sess.; p. 595-6).

The record shows that *no action was taken on this proposition.*

Fourth: Mr. Carroll made the following motion to the Convention on August 30, 1787:

> "Nothing in this Constitution shall be construed to alter the claims of the United States, or of the individual states, to the western territory; but all such claims shall be examined into, and decided upon, by the Supreme Court of the United States." (The Madison Papers, Vol. III, p. 1465; H. Doc. 398, 69th Cong.; 1st Sess.; p. 644).

While the proposed extension of jurisdiction would have only applied to the United States and individual states regarding western territory, it represents, nevertheless, the same basic proposition which is now under consideration.

The Carroll motion was postponed, and the record shows that *the Convention never took action on it.*

Turning from definitive rejection by inaction to peremptory rejection by action, we come to the proceedings of the Convention on August 30, 1787.

Fifth: On August 30, 1787, the Convention was considering Article XVII of the Randolph Plan (H. Doc. 480), regarding the admission of new states, and a discussion arose in regard to claims of the United States and individual states to territory (The Madison Papers; Vol. III, pp. 1465-1466; H. Doc. 398, 69th Cong.; 1st Sess.; pp. 644-645).

The following proposition was submitted as an addition to the draft of the Constitution:

> "The Legislature shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States; and nothing in this Constitution shall be construed as to prejudice any claims, either of the United States or of any particular state."

Thereupon, a motion was made to amend said proposal so as to add the following sentence:

> "But all such claims may be examined into, and decided upon, by the Supreme Court of the United States."

This motion to amend was peremptorily rejected by a vote of 8 States against and only 2 States for the motion (H. Doc. 398, p. 645, 1 Elliott's Debates 275, 276).

Thus, there were before the Federal Constitutional Convention propositions to grant Original jurisdiction to the United States to controversies between the United States

and an individual state and to examine into and decide upon the claims of the United States and an individual state to territory or property, none of which was incorporated into the Constitution and *the last of which was peremptorily rejected.*

Nowhere in the action of the Constitutional Convention, nor in any provision adopted as a part of the United States Constitution can it be shown that the original jurisdiction of this Court was made to extend either to controversies between the United States and any particular state or to the claim of any territory or property between the United States and any particular state.

By the action of the Constitutional Convention on August 27, 1787 in peremptorily rejecting the proposition that the Supreme Court of the United States should be given original jurisdiction to examine into and decide territorial claims of the United States and individual states, this Court was denied the very jurisdiction which the bill of complaint here seeks to have it exercise, because this Court does not have jurisdiction over the subject matter of this suit.

In view of the incontrovertible fact that the original jurisdiction of this Court stems from the Constitution of the United States, and from no other source or authority, it cannot be successfully argued or urged upon this Court, that the original jurisdiction of this Court extends to the present case which involves a controversy between the United States and the State of Louisiana, over a claim to territory or other property.

The early decisions of this Court, when the proceedings and history of the Constitutional Convention were fresh in the minds of the jurists, some of whom had either served as delegates or advocated ratification, bear out the fact that the Constitution does not give this Court original jurisdiction of a suit by the United States against a state, and, further, that the original jurisdiction conferred upon this Court by the Constitution cannot be extended.

Marbury v. *Madison*, (1803) 1 Cranch 137, held an Act of Congress unconstitutional, for the first time, because it sought to extend the original jurisdiction of this Court to suits against officials (Secretary of State) of the United States.

In *Cohens* v. *Virginia* (1821) 6 Wheat. 262, it was held that the original jurisdiction of this Court depended on the character of parties designated in the Constitution—and that after passage of the 11th Amendment, the original jurisdiction of this Court still extended to cases between two or more States, or between a State and a foreign State. (Not the United States).

In *Cherokee Nation* v. *Georgia*, (1831) 5 Peters 1, this Court held that the original jurisdiction of this Court extends only to cases in which both the Plaintiff and the Defendant are designated in the class of parties specified in the Constitution.

In this case, this Court held (p. 15):

> "Before we can look into the merits of the case, a preliminary inquiry presents itself. *Has this Court jurisdiction of the cause?*"

The Court referred to the third Article of the Constitution which describes the extent of the judicial power, Section 2 of which reads:

> "2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of Admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

and said (p. 15):

> "A subsequent clause of the same section gives the Supreme Court original jurisdiction in all cases in which a State shall be a party. The party defendant may then unquestionably be sued in this Court. *May the plaintiff sue in it?* Is the Cherokee Nation a foreign State in the sense in which the term is used in the Constitution?"

There it was held by the Court that the Cherokee Indian tribe within the United States is not a foreign State in the sense of the Constitution, and cannot maintain an action in the Courts of the United States.

By the same reasoning and authority, therefore, the United States is not a state, or a foreign State which may sue in the Supreme Court, in the sense in which the terms are used in the Constitution.

In *Rhode Island* v. *Massachusetts*, (1838), 12 Peters 657, this Court held that the sovereign States in Convention assembled made a grant to the United States of *judicial power* over controversies between two or more States, and it was ordained that the Supreme Court should have original jurisdiction in cases where a State was party *"in the cases specified"* (p. 720).

In *Florida* v. *Georgia*, (1854) 17 Howard 478, the Court held that while the United States could not intervene as party plaintiff or defendant in a suit between two States, its Attorney General would be permitted to file evidence for the information of the Court (as a sort of amicus curiae), and the Attorney General for the United States formally, in his brief, admitted that this Court is not empowered by the Constitution to entertain an original suit between the United States and a State, and that it is a settled rule of law that where the jurisdiction depends on the character of the parties, each party must be competent to sue or be sued in this Court.

In this case the United States of America, through its Attorney General, formally admitted that this Court did

not have original jurisdiction of a suit in which the United States was plaintiff against a State of the Union, as follows: (*15 L. Ed. p. 184*)

> "The United States cannot be made a party in any form to an original suit in this court between two states.
>
> • • • •
>
> (Citing Clause 2 of Section 2 of Article III of the Constitution).
>
> "But if the United States enter the suit as a technical party plaintiff, by bill of interpleader or otherwise, that would be to put an end to the suit, according to the constitutional doctrine of parties.
>
> "The court has jurisdiction in this case only in virtue of the clause of the Constitution which authorizes it to adjudicate on 'controversies between two or more states.'
>
> "To be sure, afterward, it is said, that 'in all cases . . . in which a state shall be a party the Supreme Court shall have original jurisdiction.' But this is not the delegation of a new class of jurisdiction as to subject matter. The clauses are to be taken together so as to signify that the original jurisdiction shall embrace either of the foregoing enumerated cases in which the jurisdiction attaches to a state.
>
> "*The court is not empowered by the Constitution to entertain an original suit between the United States and a state*, or the United States and two states.
>
> "*It is the settled rule of law that where the jurisdiction of the courts of the United States depends on the character of the parties*, and each party, either plaintiff or defendant, consists of a number of individuals *each one must be competent to sue or be sued in those courts; and otherwise jurisdiction cannot be entertained.*" (Emphasis added).

The Supreme Court of the United States is not empowered by any theory of inherent power to delegate to itself jurisdiction which the Constitution does not grant to it and

which the Convention, that wrote the United States Constitution, specifically refused to grant.

The constitutional question submitted to this Court by the above demurrer, or motion to dismiss is presented for the first time by special appearance in any suit filed by the United States against a particular state.

Regardless of the fact that this Court may have rendered judgments in other cases of the United States against particular states, such does not constitute *stare decisis* or precedent prejudicial to the State of Louisiana herein.

We are not unmindful in making this argument of the case of *United States* v. *West Virginia*, 295 U. S. 463, and the other cases therein cited; however, it has been the declared policy of this Court to interpret the language of the constitution *itself* free from the gloss that may have been placed upon it by earlier decisions, particularly where the precise issue was never raised by the defendants in the other cases.

In such cases the fact that other states either by design or oversight consented to be sued or failed to raise the constitutional objection to lack of jurisdiction in this Court to entertain such action by the United States against a particular state cannot be considered as authority over-riding the action of the Constitutional Convention in refusing to grant this Court original jurisdiction in such controversies.

The Constitution as originally written and the action of the Constitutional Convention in refusing to give this Court jurisdiction in such cases, has not been changed or overridden by any amendment to the United States Constitution adopted in any manner prescribed for amendment to the Constitution.

II.

This Court Has No Jurisdiction Over the Sovereign State of Louisiana Because She Has Not Consented To Be Sued.

In the event this Court should hold that it has original jurisdiction of a controversy between the United States of America and the State of Louisiana, nevertheless it has no jurisdiction *ratione personae*, that is, over Louisiana as a party, because the sovereign State of Louisiana has not consented to be sued herein.

In the case of *Kansas* v. *United States*, 204 U. S. 331, this Court held that the United States as a sovereign could not be sued by a State in the original jurisdiction of this Court *without its consent;* and in the case of *Monaco* v. *Mississippi*, 292 U. S. 313, this Court held that since a foreign nation, as a sovereign, could not be sued by a State in the original jurisdiction of this Court, *without its consent*, the State of Mississippi, as a sovereign, could not be sued by a foreign nation in the original jurisdiction of this Court, *without its consent.*

Moreover, in *Duhne* v. *New Jersey*, 251 U. S. 311, this Court categorically held that since a state could not be sued outside of this Court, without its consent, it could not be sued in this Court *without its consent;* and that the second clause of section 2 of Article 3 of the Constitution conferring jurisdiction upon this Court "in all cases . . . in which a state shall be a party" withheld the consent of a state to be sued *by anybody.* The Court held that the said second clause of section 2 of Article 3 merely distributed into original and appellate jurisdiction the jurisdiction previously conferred, and did not of itself confer additional jurisdiction.

These decisions were rendered under the identical provision of the United States Constitution, Article III, Section 2, Clause 2, under which the United States pretends to have jurisdiction in filing its bill of complaint

against the State of Louisiana. Therefore, this Court does not have original jurisdiction over the sovereign State of Louisiana *ratione personae,* because it has not consented to be sued herein. The United States has no more power or authority to institute suit against the State of Louisiana, *without its consent,* in the original jurisdiction of this Court, than the State of Louisiana has to institute suit against the United States in the original jurisdiction of this Court, *without its consent.*

This ground of the motion is the substantial equivalent of the motion to dismiss for lack of jurisdiction over a state as a party, that is, *ratione personae,* which was made and sustained in *Hans v. Louisiana,* 134 U. S. 1, the Court saying, "*The suability of a state without its consent was a thing unknown to the law*" (p. 16).

This well settled principle that a state cannot be sued without her consent is discussed at length in Louisiana's Objections, Supplemented Memorandum, Brief and Petition for Rehearing on the Federal Government's Motion for Leave to file a complaint, to which documents the Court's attention is respectfully referred.

The cases above cited demonstrate with striking force that there simply is no provision in the Constitution which grants the consent of a State to be sued by the Federal Government. They are unanswerable. **Indeed, we here challenge the Federal Government, if it opposes this motion, to cite, in quotation marks, any phrase or clause in the Constitution which it contends grants any such consent.**

We confidently assert that this is a challenge which the Federal Government has not met and cannot now meet.

And if not, then this Court has no jurisdiction over Louisiana and the complaint must be dismissed.

All of which is respectfully submitted,

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General
State of Louisiana.

L. H. PEREZ,
New Orleans, La.,

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.,
Of Counsel.

Appearing Specially.

Supreme Court of the United States

OCTOBER TERM, 1949

No. 12, Original

UNITED STATES OF AMERICA, *Plaintiff*

v.

STATE OF LOUISIANA

THE CONDITION OF THE ENSUING MOTIONS.

The foregoing motion to dismiss the complaint is confined to jurisdictional grounds only, the State of Louisiana appearing specially.

In the usual process of litigation, a defendant may appear specially and move to dismiss on jurisdictional grounds before being required to survey the merits or deficiencies of the complaint. Thus a motion to dismiss on the ground that indispensable parties have not been joined, and a motion for a bill of particulars, should only be made after jurisdictional questions have been finally determined. And when a complaint is dismissed for lack of jurisdiction, defendant is relieved from pleading to the merits.

In this case, however, the State of Louisiana is under a peculiar handicap. It is forced to file the ensuing two motions at this time under protest, and only under protest, and solely because of the order rendered by this court on June 13, 1949, directing the State of Louisiana to answer the complaint on or before September 1, 1949, "otherwise the plaintiff may proceed *ex parte*."

Hence, the ensuing two motions are submitted at this time, without in any sense waiving the defects of juris-

diction set forth in the preceding motion, and without consenting to be sued, and without in any manner submitting itself to the jurisdiction of this court or acknowledging that this court has original jurisdiction herein, as heretofore set forth in its said motion.

Accordingly, the State of Louisiana requests that the ensuing two motions be not presented to the court pending decision of the motion to dismiss for lack of jurisdiction.

Bolivar E. Kemp, Jr.,
Attorney General,
State of Louisiana.

John L. Madden,
Assistant Attorney General,
State of Louisiana.

L. H. Perez,
New Orleans, La.

Bailey Walsh,
F. Trowbridge vom Baur,
Washington, D. C.,
Of Counsel.

Appearing Specially.

Supreme Court of the United States

OCTOBER TERM, 1949

No. 12, Original

UNITED STATES OF AMERICA, *Plaintiff*

v.

STATE OF LOUISIANA

CONDITIONAL DEMURRER,

OR

MOTION TO DISMISS FOR LACK OF INDISPENSABLE PARTIES.

Subject to its motion to dismiss on jurisdictional grounds, and to "The Condition of the Ensuing Motions," as above set forth, the State of Louisiana moves to dismiss the complaint on the following ground:

I.

That, under the allegations and prayer of the bill of complaint of the United States herein, the lesses of the State of Louisiana therein referred to are indispensable parties, and this cause cannot be properly determined nor can any judgment or decree be rendered as prayed for in said bill without making said lessees parties defendant herein; and, therefore, this Court should not assume jurisdiction of this cause unless and until said lessee are made parties defendant herein.

WHEREFORE, the premises considered, the State of Louisiana prays that its foregoing demurrer, or motion to

dismiss be sustained, and that the bill of complaint of the United States of America against the State of Louisiana herein be dismissed.

BOLIVAR E. KEMP, JR.,
Attorney General,
State of Louisiana.
JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.,
Of Counsel.

Appearing Specially.

STATEMENT IN SUPPORT OF MOTION TO DISMISS FOR LACK OF INDISPENSABLE PARTIES.

I.

In Article V of the bill of complaint of the United States herein, it is alleged that the State of Louisiana has negotiated and executed such "leases with various persons and corporations, and those persons and corporations have, in violation of the rights of the United States, paid to the State substantial sums of money, entered upon said lands and drilled wells for the recovery of petroleum, gas and other hydrocarbon substances. Such wells have been producing quantities of petroleum, gas and other hydrocarbon substances, which the lessees of the State have taken and converted to their own uses * * *, but neither the State nor its lessees have recognized the rights of the United States nor have they paid to the United States either the value of the petroleum and other things taken from the area, or any royalties thereon."

In Article VII of said bill of complaint, it is alleged that, * * * "The State will continue to claim such ownership for itself and to exercise the rights incident to such ownership through its officers, agents and employees, and will continue to aid, abet and encourage others, as its *lessees*, to tresspass upon and to take and use the minerals and other things of value in the area, in violation of the rights of the United States, from which the United States will suffer irreparable injury, and for which it has no adequate remedy except by this action."

In the prayer of said bill of complaint, *Plaintiff prays that a "decree be entered* adjudging and declaring the rights of the United States as against the State of Louisiana in the area herein described, *enjoining* the State of Louisiana and *all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States."* etc. (Emphasis added)

By the above allegations in the bill of complaint of the United States as plaintiff herein, its action is as much an

action against the State's lessees as it is against the State of Louisiana, itself, and the remedy sought in the prayer specifically asks for injunction to issue against these lessees as persons claiming under the State of Louisiana, and they allege that the lessees have failed to pay to the United States the value of the petroleum, etc., taken from the area,—i.e., the full value of the 8/8th of the oil and "other things."

It is inescapable, therefore, that any judgment or decree rendered in accordance with said allegations or prayer of said bill must necessarily adjudicate upon the rights and interest of the State's lessees referred to in said bill of complaint,—although said lessees referred to are not named or made parties defendant in the bill of complaint.

As a matter of law, the rights of parties alleged against in the bill of complaint should not be adjudicated upon without said parties being brought before the court as parties defendant, especially, as in this case, where lessees are indispensable parties who not only have a most substantial interest in the subject matter of the controversy, but an interest of such nature that a final decree cannot be rendered between the other parties to the suit without radically and injuriously affecting the interest of said lessees, and in such a situation its final determination would be inconsistent with equity and good conscience. (*Lawrence* v. *Sun Oil Co.;* (C.C.A. 5th, 1947) 76 F. Supp. 155; *Ducker* v. *Butler,* 1939, 104 Fed. 236, 78 App. D.C. 103; *Shields* v. *Barrow,* 17 How. 130, 139, 15 L. Ed. 158; *Shell Development Co.* v. *Universal Oil Products Co.,* C.C.A. Del. 1946, 157 Fed 421; *Shuckman* v. *Rubenstein,* C.C.A., Ohio 1947, 164 F. 2d 952, cert. den. 333 U. S. 875; *Wesson* v. *Crain,* C.C.A. Ark. 1948, 165 F. 2d 6; *Steinberg* v. *American Bantam Car Co.,* D. C. Pa. 1948, 76 F. Supp. 426, appeal dismissed, 173 F. (2d) 179.)

Indeed, in *Lawrence* v. *Sun Oil Co.,* 76 F. Supp. 155, Affirmed 166 Fed. 2d 466, it was held that where rights of parties as lessees are dependent upon the strength of their titles as against adverse claimants to the fee, all lessors

and lessees should be before the court so that a judgment binding upon all may be had.

In its decision affirming the District Court, the Appellate Court in the above case, said (p. 469):

> "(3) In an early case, the Supreme Court of the United States, *Shields* v. *Barrow*, 17 How. 130, 139, 15 L. Ed. 158, said:
>
> 'Persons who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience (are indispensable parties.) * * *'
>
> "Since then, in numerous adjudications it has been held that the test of indispensability is whether the absent party's interest in the subject matter of the litigation is such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the rights of the absent party."

See also: *Barney* v. *Baltimore*, 73 U. S. 280; *Boaurdieu* v. *Pacific Western Oil Co.*, 299 U. S. 65; *Keegan* v. *Humble Oil & Refining Co.* (C. C. A. 5th), 155 F. (2d) 971; *Calcote* v. *Texas Pacific Co. & Oil Co.* (C. C. A. 5th), 157 F. (2d) 216, cert. den. 67 Sup. Ct. 205.

The allegations of the bill of complaint herein show that the parties in possession of the lands in the area complained of are the State's lessees.

As a matter of fact, the rights and interests of the State's lessees referred to and alleged against in the bill of complaints herein are more substantial monetarily than even the rights and interests of the State of Louisiana in the area covered by said leases for the reason that the lessees are holders and owners of record of mineral leases under which said lessees are entitled to approximately seven-eighths of the minerals which may be produced from said area, whereas, the State of Louisiana is entitled to only approximately

one-eighth of said minerals, and the lessees, as alleged trespassers, could be held to payment of the full value of all oil and "other things" taken from said area.

Furthermore, said lessees have paid millions of dollars of cash bonuses and rentals for their said leases, under which they were granted by the State of Louisiana the right to explore, develop and produce whatever oil or other minerals there may be in their respective acreages in said area of the Gulf of Mexico within the boundaries of the State of Louisiana. Some of said State lessees have invested millions of dollars in exploration, development, construction and operations for the production of oil and other minerals under their said leases.

All said leases are public records in the State of Louisiana and include the names of the State's lessees, the acreages under mineral lease to them in the area alleged upon in said bill of complaint and the considerations paid by them to the State of Louisiana for said leases. Said facts of public record have at all times been available to the plaintiff, the United States of America and its legal officers, representing plaintiff herein, and there was no justification in fact or in law for said lessees to have been omitted as parties defendant herein.

A list of the names of said lessees, referred to in the bill of complaint herein, and against whom plaintiff alleges, the acreages of lands or water bottoms in the Gulf area alleged upon in the bill of complaint herein, and the considerations paid for said leases are as follows:

OFFSHORE LEASING ACTIVITIES BY COMPANIES.

Company	Acreage	Bonus	Rental
Barnsdall Oil Company	9,989.10	$ 35,808.00	Not Due
Barnsdall, Seaboard and Callery	62,268.36	477,652.00	$ 222,775.00
The California Company	188,857.89	2,354,670.00	664,437.50
Continental Oil Company	40,000.00	374,800.00	Not Due
Continental, Cities Service, Tidewater, and Atlantic	468,522.62	1,900,744.00	442,106.00
I. J. Goode	18,611.00	139,936.10	Not Due
Gulf Refining Company	18,374.00	228,217.25	55,153.88
Humble Oil Company	208,485.90	3,920,505.51	1,694,100.21
Hunt Oil Company	9,462.18	247,196.78	Not Due
W. B. Jayred	1,248.64	25,000.00	Cancelled
Kerr-McGee Oil Industries, Inc.	72,262.00	828,051.00	468,525.50
Kerr-McGee, Phillips, & Stanolind	15,000.00	110,000.00	Not Due
Magnolia Petroleum Company	289,272.98	1,558,972.65	1,369,205.81
Pan-American, & Seaboard Company	119,008.51	1,036,579.73	19,363.16
Phillips Petroleum Company	78,888.42	1,653,432.00	Not Due
Phillips, Kerr-McGee	2,500.00	20,000.00	Not Due
Pure Oil Company	168,375.54	1,122,625.00	532,225.00
Shell Oil Company	315,226.62	2,135,512.80	591,071.69
Sohio Petroleum Company	7,207.00	38,269.17	19,134.59
Stanolind Oil and Gas Company	214,946.39	2,773,728.79	825,931.07
Sun Oil Company	55,942.50	888,937.95	Not Due
Superior Oil Company	116,514.66	2,763,215.92	708,158.56
The Texas Company	100,857.51	950,118.02	422,895.39
Union Oil Company of California	17,909.13	206,249.92	99,999.96

DATA OF OFFSHORE LEASING ACTIVITIES EXCLUDING CHANDELEUR SOUND, BRETON SOUND, MAIN PASS, SOUTH PASS AND THE PORTION OF SOUTH TIMBALIER IN CAILLOU BAY.

Company	Acreage	Bonus	Rental
The California Company	137,786.15	$2,123,334.00	$ 554,409.50
Continental Oil Company	40,000.00	374,800.00	Not Due
Continental, Cities Service, Tidewater & Atlantic Oil Company	468,522.62	1,900,744.00	442,106.00
I. J. Goode	18,611.00	139,936.10	Not Due
Humble Oil Company	205,985.90	3,905,255.51	1,686,475.21
Hunt Oil Company	9,462.18	247,196.78	Not Due
Kerr-McGee Oil Industries, Inc.	72,262.00	828,051.00	468,525.50
Kerr-McGee, Phillips, & Stanolind	15,000.00	110,000.00	Not Due
Magnolia Petroleum Company	289,272.98	1,558,972.65	1,369,205.81
Pan American & Seaboard Oil Co.	119,008.51	1,037,199.73	19,363.16
Phillips Petroleum Company	78,888.42	1,653,432.00	Not Due
Phillips, Kerr-McGee Oil Industries	2,500.00	20,000.00	Not Due
The Pure Oil Company	168,375.54	1,122,625.00	532,225.00
Shell Oil Company	56,122.82	282,008.36	34,904.18
Sohio Oil Company	7,207.00	38,269.17	19,134.59
Stanolind Oil Company	214,946.39	2,773,728.79	825,931.07
Sun Oil Company	55,942.50	888,937.95	Not Due
Superior Oil Company	116,514.66	2,763,215.92	708,158.56
The Texas Company	59,762.37	497,590.00	322,570.00

DATA ON MAIN PASS, SOUTH PASS, CHANDELEUR SOUND, BRETON SOUND, AND THE PORTION OF SOUTH TIMBLIER IN CAILLOU BAY BY COMPANIES.

Company	Acreage	Bonus	Rental
Barnsdall Oil Company	9,989.10	$ 35,808.00	Not Due
Barnsdall, Seaboard & Callery	62,268.36	477,652.00	$ 222,775.00
The California Company	51,071.74	431,336.00	110,028.00
Gulf Refining Company	18,374.00	228,217.25	55,153.88
Humble Oil & Refining Company	2,500.00	15,250.00	7,625.00
W. B. Jayred	1,248.64	25,000.00	Cancelled
Shell Oil Company	259,103.80	1,853,504.44	556,167.51
The Texas Company	41,094.16	452,527.61	100,325.39
Union Oil Company of California	17,909.13	206,249.92	99,999.96

All of the above lessees referred to and alleged against in the bill of complaint and against whom judgment and decree are prayed for by the United States are available and can be served with regular process of this Court in this matter.

When necessary or indispensable parties are omitted, the Court should not assume jurisdiction.

All of which is respectfully submitted.

BOLIVAR E. KEMP, JR.,
Attorney General,
State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.,
Of Counsel.

Appearing specially.

Supreme Court of the United States

OCTOBER TERM, 1949

No. 12, Original

UNITED STATES OF AMERICA, *Plaintiff*

v.

STATE OF LOUISIANA

CONDITIONAL MOTION FOR A MORE DEFINITE STATEMENT AND FOR A BILL OF PARTICULARS.

Subject to its motion to dismiss, on jurisdictional grounds, and to "The Condition of the Ensuing Motions," as above set forth, the State of Louisiana moves the Court for an order requiring the plaintiff to make a more definite statement and to file a bill of particulars of the following items:

I.

Full and Complete Statements:

(a) As to what times are referred to in the phrase "all times herein material," as alleged in paragraph II of the complaint. Specifically, defendant is entitled to know:

(b) At what time or times the plaintiff contends it became "the owner in fee simple of . . . . the lands, minerals and other things" in the area described in the complaint;

(c) At what time or times the plaintiff contends that it became "possessed of paramount rights in, and full dominion and power over the lands, minerals and other things" in the area described in the complaint;

(d) From whom, and in what manner, plaintiff acquired its ownership "in fee simple * * * of the lands, minerals, and other things" underlying the area, as alleged in paragraph II of the complaint;

(e) Of the precise character of the "paramount rights in, and full dominion and power over the lands, minerals and other things" claimed by plaintiff in the area described, as alleged in Paragraph II of the complaint.

(f) Whether the "paramount rights in, and full dominion and power over, the lands, minerals and other things" in the area of the Gulf of Mexico, as alleged in Paragraph 2 of the complaint, are specially applicable to said area only, or generally applicable to inland water areas, air lanes, and land areas of the State of Louisiana and of the other States of the Union, as well as to said area.

(g) From whom, in what manner, and by what authority plaintiff acquired such "paramount rights in, and full dominion and power over the lands, minerals and other things" in the area, as alleged in Paragraph II of the complaint.

(h) A full and clear description of the lands lying seaward of the ordinary low-water mark, "at all times herein material," on the coast of Louisiana and outside of the inland waters, of which plaintiff is "the owner in fee simple of or possessed of paramount rights in, and full dominion and power over," as alleged in Paragraph II of the complaint, accompanied by available United States Coast and Geodetic maps, suitably marked to delineate and identify such lands.

II.

Full and Clear Statements:

(a) Of the precise character of the "right, title, or interest in said lands, minerals and other things" the State of Louisiana "claims" which are "adverse to the United States," as alleged in paragraph III of the complaint.

(b) In what manner or respect the "right, title or interest in said lands, minerals, and other things," "claimed" by the State of Louisiana, are "adverse to the United States," as alleged in paragraph III of the complaint.

III.

Full and Clear Statements:

(a) Of the precise character of the "rights of the United States" which the State of Louisiana and its lessees have violated or failed to recognize, as alleged in paragraph V of the complaint.

(b) What "persons and corporations," and who on behalf of such "persons and corporations," have, in violation of the rights of the United States, paid to the State of Louisiana substantial sums of money, entered upon said lands and drilled wells for the recovery of petroleum, gas and other hydrocarbon substances, as alleged in paragraph V of the complaint.

(c) What lessees of the State of Louisiana, and who on behalf of such lessees, "have taken and converted to their own uses" "petroleum, gas and other hydrocarbon substances" and "have paid to the State substantial sums of money in bonuses, rents and royalties reserved under the leases," as alleged in paragraph V of the complaint.

(d) Who on behalf of the State of Louisiana, and which of its lessees, have not "recognized the rights of the United States" and have not "paid to the United States either the value of the petroleum and other things taken from the area, or any royalties thereon," as alleged in paragraph V of the complaint.

(e) What "other things" the State of Louisiana and its lessees have taken from the area, as alleged in paragraph V of the complaint, whether fish, shrimp, clams, oysters, shells, gravel, sand or other non-mineral substances.

(f) Of the location and description of the lands on which each of the "persons and corporations" has, "in vio-

lation of the rights of the United States," entered, drilled wells and produced petroleum, gas and other hydrocarbon substances, and from which "other things" have been taken, as alleged in paragraph V of the complaint.

(g) An itemized and detailed statement of the "substantial sums of money in bonuses, rents and royalties reserved under the leases," which each lessee has paid to the State, as alleged in paragraph V of the complaint.

(h) An itemized and detailed statement of the "value of the petroleum and other things taken from the area," which the State of Louisiana and its lessees have not paid to the United States, as alleged in paragraph V of the complaint.

(i) An itemized and detailed statement of the royalties on the "value of the petroleum and other things taken from the area," which the State of Louisiana and its lessees have not paid to the United States, as alleged in paragraph V of the complaint.

(j) An exact description of the part or parts of the alleged area for which substantial sums were paid to the State of Louisiana, and how much was paid for each said part of the area by each lessee, as alleged in Article V of the complaint.

(k) What sums does the United States claim it was or is entitled to under law from the State of Louisiana and from each of its lessees, and from which of its lessees by name, "in bonuses, rents and royalties," or as "the value of the petroleum and other things taken from the area," with an exact description of the part or parts of the area from which plaintiff claims it is entitled to each said sum claimed by it, as alleged in paragraph V of the complaint.

IV.

Full and Clear Statements:

(a) Of who, on behalf of the State of Louisiana, has "frequently and publicly denied the rights and powers of the United States" in the area described in the complaint,

and "has claimed full and complete ownership for itself," as alleged in paragraph VII of the complaint; whether each such denial and claim was oral or in writing; if in writing, attach a copy thereof; if oral, state the substance thereof; and state the time and place of each such denial and claim.

(b) Of the precise character of the "rights and powers of the United States in the area," which have been "denied" by the State, as alleged in paragraph VII of the complaint.

(c) Of the precise character of the "full and complete ownership of the area," which the State of Louisiana "has claimed" for itself, as alleged in paragraph VII of the complaint.

WHEREFORE, defendant prays that an order be entered directing plaintiff to file a more definite statement and a bill of particulars as above set forth, and that defendant's time to answer or otherwise plead be extended to and including sixty (60) days after the filing by plaintiff and service upon the defendant of said definite statement and bill of particulars.

BOLIVAR E. KEMP, JR.,
Attorney General,
State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.,
Of Counsel.

Appearing Specially.

STATEMENT IN SUPPORT OF MOTION.

There are tremendous issues and vast sums of money, according to the claim of the Federal Government, bound up in this law suit. The Federal Government claims that it has either "fee simple," or what it describes as "paramount rights in, and full dominion and power over" the lands, minerals and other things underlying the marginal sea off the coast of Louisiana.

Yet the complaint of the Federal Government is a very brief document, the allegations of which do not exceed three pages, and which are couched in the most vague, general and indeed, ambiguous terms.

It is an elementary rule of pleading that a defendant must be informed of the particulars of the claim upon which plaintiff relies. And if plaintiff's complaint fails to allege the particular facts of the claim, defendant is entitled to an order requiring the plaintiff to make his complaint more definite and certain and to furnish the necessary particulars of his claims. The purpose of these particulars is (1) to enable the defendant properly to file a responsive pleading; (2) to delineate the issues in clear and unmistakable terms, and (3) to enable the defendant to properly prepare for trial.

The basic theory of a law suit is to bring out the truth. The extravagant and vague claims of this complaint emphasize the need for this particular plaintiff to state its claims clearly and with definiteness, and the essential particulars thereof, in order that this defendant may properly plead and may know with certainty the precise nature

of the plaintiff's claim and the specific issues which the defendant will have to meet.

BOLIVAR E. KEMP, JR.,
Attorney General,
State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.,
Of Counsel.

Appearing Specially.

Supreme Court of the United States

OCTOBER TERM, 1949

No. 12, Original

UNITED STATES OF AMERICA, *Plaintiff*

v.

STATE OF LOUISIANA

CONDITIONAL MOTION FOR EXTENSION OF TIME TO ANSWER OR OTHERWISE PLEAD.

Subject to its motion to dismiss on jurisdictional grounds, and to the "Condition of the Ensuing Motions" as above set forth, the State of Louisiana moves for an extension of time to answer or otherwise plead as hereinafter set forth.

This defendant is filing herewith a conditional motion to require plaintiff to file and serve a more definite statement and a bill of particulars.

This motion is made only out of an abundance of caution. Rule 12(a) of the Federal Rules of Civil Procedure, adopted by the United States Supreme Court, clearly provides that a motion directed to a complaint automatically defers the requirement of serving an answer to the complaint until after disposition of the motion.

WHEREFORE, the defendant moves:

1. In the event that its motion for a more definite statement and a bill of particulars is granted, for an order extending its time to answer or otherwise plead to and including 60 days from the date of filing and service of said statement and bill of particulars;

2. In the event of denial of such motion, for an order extending its time to answer or otherwise plead to same to and including 30 days from the date of the order denying such motion.

BOLIVAR E. KEMP, JR.,
Attorney General,
State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.,
Of Counsel.

Appearing Specially.

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Supreme Court of the United States

October Term, 1949.

No. 12, Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S "MOTION FOR JUDGMENT."

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.
Of Counsel.

Appearing Specially.

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Supreme Court of the United States

October Term, 1949.

No. 12, Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S "MOTION FOR JUDGMENT."

Statement.

On September 1, 1949, the State of Louisiana, Defendant, filed in the office of this Court a Motion to Dismiss the Complaint on jurisdictional grounds; a Conditional Motion to Dismiss for lack of indispensable parties; a further Conditional Motion for Bill of Particulars; and, in the alternative, a Motion for Extension of Time to file Answer or otherwise plead, that Motion making special reference to Rule 12 (a) of the Federal Rules of Civil Procedure deferring the necessity for further answer until the Motions so filed shall have been acted upon by the Court.

Plaintiff has made no offer to meet the issues raised by these Motions, or to dispute the grounds upon which they are based. Instead, it has filed a Motion for Judgment and

a Statement characterizing the first of the Motions filed by the State of Louisiana as being "of an insubstantial character, calculated to delay the adjudication of this case on the merits". But that Statement specifically mentioned only the Motion challenging the jurisdiction of this Court; the other serious Motions now pending being noticed only by the Statement's erroneous charge that the same Motion attempts "to raise other objections".

This memorandum is an answer to the Government's Motion, to point out reasons why it should be rejected, the principal one of which is the unprecedented request that judgment be rendered only on the Complaint, either with or without argument, *in entire disregard of serious, undisputed defenses that are now pending.*

The False Accusation of Delay.

In its "Statement in Respect to Motion", plaintiff attempts to give the impression that Louisiana somehow already has wrongfully delayed the progress of this lawsuit, by filing documents between January and May, 1949. Plaintiff fails to state that, although it filed its motion for leave to file its complaint on December 21, 1948, it did not file its supporting brief until March 10, 1949, one month after defendant filed its previous document on February 9, 1949.

The charge that the State of Louisiana has engaged in "tactics" that are "contrary to the public interest" is unfounded and unjustified. It does not pretend to have the slightest basis in fact. On the contrary, Defendant has filed its Motion specially answering the allegations of the Complaint with the intention of having those Motions presented and decided by the Court in an orderly way. The State of Louisiana is ready and anxious to have those Motions fixed for oral argument.

Louisiana Has Followed Fixed Procedure.

The State of Louisiana has acted in strict conformity with the requirements of the subpoena and the Order of this Court dated June 13, 1949, and with the rules estab-

lishing the procedure in Federal Courts in the exercise of their original jurisdiction.

The subpoena issued to Louisiana on May 17, 1949, "commanded" Louisiana to "be and appear before the Supreme Court, on or before September 1, 1949 * * * to answer unto the complaint * * * you are not to fail at your peril".

The Order of June 13, 1949, directed the State of Louisiana "to answer the allegations of the complaint within the time specified in the subpoena, otherwise the Plaintiff may proceed *ex parte*".

The language of that order is no different from the subpoena served on Louisiana, nor is it any different from the form of summons found in the appendix of forms (Form 1), in the Federal Rules of Civil Procedure adopted by this Court. That form also directs the defendant to "serve upon plaintiff's attorney . . . an answer to the Complaint" within a specified time, and concludes with a statement:

> "If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint".

The form of the subpoena and order did no more than place the State of Louisiana in the position of any other defendant.

Rule 12 (a) of the Federal Rules of Civil Procedure provides:

> "* * * The Service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement."

Rule 12 (b) provides:

> "* * * that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdic-

tion over the subject matter, (2) lack of jurisdiction over the person, * * * (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted."

Rule 12 (e) provides that:

"If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just."

Louisiana has filed the very motions provided for in the above quoted Rules, which automatically defer the filing of serving of a responsive pleading, and plaintiff has failed to dispute the grounds upon which these motions are based, or to meet the issues presented by said motions, which justify the dismissal of its complaint. Yet plaintiff asks that this Court refuse to consider these defenses, properly pleaded on the mere assertion of its legal representatives that the defenses are "insubstantial".

A Demurrer or Motion is an Answer in Law to the Allegations of the Complaint According to the Age-Old Rule.

This Court had occasion to adjudicate upon this very question over 100 years ago, in the exercise of its original jurisdiction.

In *New Jersey* v. *New York*, (1831) 5 Peters 283, 291, the Court had entered the following order:

"* * * it is further decreed and ordered, that unless the defendant, being served with a copy of this decree sixty days before the ensuing August term of this court,

> shall appear on the second day of the next January term thereof *and answer the bill of the complainant*, this court will proceed to hear the cause on the part of the complainant and to decree on the matter of the said bill." (Emphasis added)

Defendant, the State of New York, then filed a demurrer within the time specified. Plaintiff urged that New York had failed to appear and answer by the time fixed in the order, and that the case should be put on its merits.

Chief Justice Marshall, for the Court, rejected this contention and held (6 Peters, 323, 327, in 1832) that a demurrer is an answer in law to a complaint, saying:

> "The demurrer, then being admitted as containing an appearance by the State, the court is of opinion that it amounts to a compliance with the order at the last term. In that order the word 'answer' is not used in a technical sense, as an answer to the charges in the bill under oath; but an answer, in a more general sense, to the bill. *A demurrer is an answer in law to the bill*, though not in a technical sense, an answer, according to the common language of practice. (Emphasis added)
>
> The Court, therefore, direct the demurrer to be set down for argument on the first Monday of March of this term, according to the motion of the plaintiffs."

That decision, the rule of the Court, has been followed consistently in Federal and State Courts, ever since.

Defendant's motion to dismiss on the ground of the Court's lack of jurisdiction of subject matter raises a question of jurisdiction which must be met whenever raised. *Ackerman* v. *Case Co.*, D. C. Wis. 1947, 74 F. Supp. 639.

The absence of indispensable parties alone justifies granting defendants' motion to dismiss complaint for lack of jurisdiction. *American Insurance Co.* v. *Bradley Mining Co.*, D. C. Cal. 1944, 57 F. Supp. 545.

In *Bowles* v. *Glick Bros. Lbr. Co.*, 146 F. (2d) 566, followed in 146 F. (2d) 652, certiorari denied, 65 S. Ct. 1554,

325 U. S. 877, 89 L. Ed. 1994, rehearing denied, 66 S. Ct. 12, 326 U. S. 804, 90 L. Ed. 490, it was held that, if defendant needs additional information to enable him to answer or prepare for trial, the proper procedure is by motion for a more definite statement or for a bill of particulars. (Rule 12 (b) (e))

And in *Blanton* v. *Pacific Mutual Life Ins. Co.*, D. C. N. C. 1944, 4 F. R. D. 200, appeal dismissed 146 F. (2d) 725, it was held that when a motion for bill of particulars was made, the effect of it was automatically to extend the time for answering until after the motion was acted upon, making it unnecessary for defendant to accompany his motion for bill of particulars with a motion for further extension of time to answer. To same effect: *Faske* v. *Radbill*, (1947) F. R. D. 234.

Following are State cases holding, as above, that a demurrer or motion is an answer in law to the complaint:

Aker v. *Coleman*, 60 Idaho 118, 88 P. (2d) 869, 873.
Davidson v. *Graham*, 25 Cal. App. 484, 144 P. 147, 148.
Lord v. *Garland*, 27 Cal. (2d) 840, 168 P. (2d) 5, 11.
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Oliphant v. *Whitney*, 34 Cal. 25, 27.
Woods v. *First Nat. Bank of Chicago*, 314 Ill. App. 340, 41 N. E. (2d) 235.
Thomas v. *Sterling Finance Co.* (Mo. App.), 180 S. W. (2d) 788, 790.
Lyman v. *Bechtel*, 55 Iowa 437, 7 N. W. 673, 674.
Stockham v. *Knollenberg*, 133 Md. 337, 105, A, 305, 307.
Viles v. *Green*, 91 Wis. 217, 64 N. W. 856.
Howell v. *Howell*, 15 Wis. 55, 59.
Rider v. *McElroy*, 194 Ark. 1106, 110 S. W. (2d) 492.
Willis v. *Marks*, 29 Or. 493, 45 P. 293, 294.
Esden v. *May*, 36 Nev. 611, 135 P. 1185, 1187.

Furthermore, the rule originally pronounced by the Court through Chief Justice Marshall in 1832, as the rule

for the original jurisdiction of this Court, has now been embodied by the Court in Rule 12 of the Federal Rules of Civil Procedure; and, therefore, it is the same age-old rule which applies to Louisiana, as a defendant in this Court, as to all other defendants before the courts of the land.

The Court's order cannot be taken to mean, as is contended by plaintiff's legal representatives, that Louisiana has been deprived of her legal right to file answers in law, by demurrers or motions to dismiss the complaint, on the grounds (1) that the allegations of the complaint fail to show that this Court has jurisdiction over the defendant or over the subject matter, and (2) that the allegations of the complaint fail to make the State's lessees who are indispensable parties, parties defendant, herein; and (3) that the allegations of the complaint are so vague, general and insufficient that defendant is unable properly to answer thereto, and that therefore a more definite statement should be made by plaintiff and particulars furnished by it, in the several respects pointed out in defendant's motion.

Boiled down, the contention of the Federal Government actually amounts to this, that this Court should discriminate against Louisiana and treat her differently from all other defendants, by precluding her from making the legal defenses which are available to all other defendants by demurrer or motion.

The Defenses Raised by Demurrers or Motion Are Valid.

(1)

Is it an "insubstantial" defense for a defendant to question the jurisdiction of a court in which the defendant is sued?

The issue of jurisdiction has not been set at rest. The Order of this Court overruling the objections to Leave to File a Complaint did not in any sense hold or state that jurisdiction had been assumed over Louisiana as a party to this lawsuit. Indeed, it could not possibly have so held,

for at that time process had not issued and no attempt had been made to subject Louisiana to the effect of the Complaint that was allowed to be filed, or to the jurisdiction of this Court.

The uniform practice of this Court evidences that the jurisdictional question was not foreclosed. Jurisdictional questions in particular usually have been disposed of in cogent opinions after the granting of motions for leave to file a complaint. *Washington* v. *Northern Securities Company*, 185 U. S. 254, *Louisiana* v. *Texas*, 176 U. S. 1. In *Louisiana* v. *Texas*, jurisdictional questions were raised on Motion for Leave to File the Complaint and leave was nonetheless granted, as "of course". But subsequently Defendants demurred, and *the case was then dismissed for lack of jurisdiction.*

The jurisdictional objection is not a matter of indifferent consequence. The issue goes to the very vitals of the relations between the Federal Government and the State; and we do not believe this Court will treat it lightly nor decide for or against Louisiana without stating reasons for its decision, as plaintiff would now have it do.

(2)

Can it be said that Defendant offers an "insubstantial" defense when moving for dismissal of a Complaint because of the lack of indispensable parties?

That traditional defense is one specifically provided for by the Federal Rules of Civil Procedure. It is one that is particularly important here when the Complaint asks for judgment against defendant State's lessees who have substantial property and legal rights placed at issue, without joining them as defendants.

(3)

Can it be said that a defense is "insubstantial" when a defendant's Motion, which meets the strict language of the Rules of Civil Procedure, seeks an order requiring Plain-

tiff to file a Bill of Particulars and sets out in each and every detail in which the Complaint lacks that particularity and definiteness necessary to enable the defendant properly to file responsive pleadings? (See pages 25 and 29 of Defendant's Motion, filed Sept. 1, 1949).

Conclusion.

The defenses urged by the Motions do specially "answer the allegations of the Complaint".

The defenses are sound and undisputed, and when upheld by the Court will not *delay* the case—they will result in its entire dismissal.

And Defendant respectfully submits that there is no basis for the Motion for Judgment filed by the United States, as there is no juistification for this Court to ignore the defenses raised by demurrer and motion, and therefore, the Motion for Judgment should be denied and Defendant's Motions should be fixed for hearing.

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.
Of Counsel.

Appearing specially.

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OCTOBER TERM, 1949.

No. 12, Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

ANSWER

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,

F. TROWBRIDGE VOM BAUR,
Washington, D. C.

CULLEN R. LISKOW,
Lake Charles, La.

Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 12, Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

ANSWER

Now comes the State of Louisiana, defendant herein, through its Attorney General, without abandoning but re-asserting, re-urging and reserving all rights under its Objections to The Filing of Complaint Herein, its Demurrer, or Motion to Dismiss on Jurisdictional Grounds, and its Conditional Motions; and without in any manner consenting to be sued, or submitting itself to the jurisdiction of this Court, answers said Complaint as follows, to-wit:

FIRST DEFENSE

Defendant moves to dismiss the Complaint of the United States of America for the reasons, (1) that the said Complaint fails to present a case or controversy under Article III, Section 2 of the Constitution of the United States or otherwise; (2) that this Court has no jurisdiction in equity herein; and (3)

that said Complaint fails to set forth a claim on which relief can be granted; all as hereinafter more particularly set forth, to-wit:

(a) That according to Statement filed with said Complaint, the purpose of the United States of America in this litigation is "to establish the rights of the United States to the lands, minerals and other things underlying the Gulf of Mexico adjacent to the coast of Louisiana" and within the territorial limits of the State; the said Complaint asking that the rights of the United States of America be established and declared by this Court.

(b) That the Complaint does not allege that Defendant has denied or denies, and Defendant does not deny but on the contrary admits, that the United States has paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Gulf of Mexico adjacent to the coast of Louisiana, to the extent of all governmental powers existing under the Constitution, laws and treaties of the United States.

(c) That the relief prayed for and sought in and by the Complaint depends on the existence of conflicting claims of governmental powers to authorize the use of the bed of the Gulf of Mexico within the territorial limits of the State of Louisiana for the purpose

of searching for and producing oil and other natural resources.

(d) That the Congress of the United States has not adopted nor is there now in force and effect any law of the United States asserting such Federal power or purporting to authorize the United States or any agency, lessee or licensee of the United States to search for and produce minerals and other things of value, including oil, in, on or under the bed of the Gulf of Mexico lying within the territorial limits of the State of Louisiana and particularly the area described in said Complaint.

(e) That there are no conflicting claims of governmental powers to authorize the use of the bed of the Gulf of Mexico within the territorial limits of Louisiana for the purposes herein stated; that there is no actual justiciable controversy between the United States and the State of Louisiana; this Court has no jurisdiction in equity herein; and the Complaint herein fails to state a claim upon which relief can be granted.

WHEREFORE, Defendant moves that upon consideration of said First Defense, it be sustained and that judgment be rendered in favor of the State of Louisiana and against the United States of America, dismissing the Complaint.

SECOND DEFENSE

In answer to Articles I to VII, inclusive, of said Complaint, Defendant:

I.

Denies that this Court has jurisdiction over the State of Louisiana, as alleged in Article I of the Complaint.

II.

Admits, that, to the extent of its Constitutional powers, Plaintiff has paramount rights in; and full dominion and power over, the lands, minerals, and other things underlying the Gulf of Mexico off the coast of Louisiana; but denies that Plaintiff ever was or now is the holder of fee simple title to such lands, minerals and other things underlying the Gulf of Mexico within the said limits of the State of Louisiana; and except as herein admitted, denies each and every allegation contained in Article II of the Complaint.

III.

Admits that the State of Louisiana claims to be and is the holder of fee simple title to the said lands, minerals and other things, subject to the Constitu-

tional powers of Plaintiff and except as herein admitted, denies each and every allegation in Article III of the Complaint.

IV.

Admits that the State of Louisiana claims to be and is the holder of fee simple title to the said lands, minerals, and other things, as above, and has, by general law, authorized the leasing of said lands, but denies that said law and the authority therein conferred were or are adverse to or in conflict with the Constitutional powers of Plaintiff; and, except as herein admitted, denies each and every allegation in Article IV of the Complaint.

V.

Admits that the State of Louisiana claims to be and is the holder of fee simple title to, and pursuant to law, has negotiated and executed leases of lands underlying the Gulf of Mexico within its said limits with various persons and corporations; that wells have been drilled on such lands which are producing petroleum, gas and other hydrocarbon substances; and admits that over a period of many years, since 1812, it has granted leases and licenses for the purpose of removing shells, sand, and other things of value from said lands; that such leases and licenses have been

granted and all operations thereunder have been conducted subject to, consistently with, and with full recognition of the Constitutional powers of Plaintiff, as can and will be proven by competent evidence on the trial hereof; that neither the State of Louisiana nor its lessees have paid to the United States either the value of the petroleum and other things taken from the area or any royalties thereon; and, except as herein admitted, denies each and every allegation in Article V of the Complaint.

VI.

Denies the allegations set forth in Article VI of the said Complaint, and shows that, to the contrary, the State of Louisiana claims to be and is the holder of fee simple title to the lands in said area within its said limits, subject to Plaintiff's constitutional powers, as set forth in Article II hereof.

VII.

Admits that the State of Louisiana claims to be and is, and will continue to claim to be, the holder of fee simple title to the lands in said area with all the incidents thereof, subject to the Constitutional powers of Plaintiff; denies that the State of Louisiana has ever denied or interfered with or is now denying or interfering with any of the Constitutional powers

of Plaintiff over said area; and except as herein admitted, denies each and every allegation contained in Article VII of the Complaint.

FIRST AFFIRMATIVE DEFENSE

The State of Louisiana is the holder of fee simple title to all the lands, minerals and other things underlying all navigable waters within the territorial limits of the State, subject to the Constitutional Powers of the United States in such area, the fee simple title so held by Louisiana having become vested in the State in the following manner:

(a) Prior to July 4, 1776, the Crown of England had and exercised full territorial jurisdiction and sovereignty in and over, and held fee simple title to, all lands under navigable waters within the territorial limits of the thirteen colonies in America lying on the Atlantic Coast.

(b) By the Declaration of Independence of July 4, 1776, as confirmed by (1) the Articles of Confederation of July 9, 1778, (2) the Treaty of Peace with Great Britain of 1783 and (3) the Constitution of the United States, the said thirteen colonies in America became separate, free and independent Sovereign States and exercised and do now exercise territorial jurisdiction and sovereignty in and over, and held and

now hold fee simple title to, all lands under navigable waters within their territorial limits.

(c) By the treaty between the French Republic and the United States concerning the cession of Louisiana, signed at Paris, April 30, 1803, the territory of Louisiana, with all its rights and appurtenances was ceded to the United States, subject to the condition that the ceded territory and the appurtenances thereof be incorporated as a Sovereign State in the Union of the United States and admitted as such as soon as possible, according to the principles of the Federal Constitution.

(d) By Act of Congress of October 31, 1803, the President of the United States, pursuant to said treaty with the French Republic, was authorized to take possession of and occupy the territory so ceded and was directed to maintain and protect the inhabitants of Louisiana in the free enjoyment of liberty, property and religion.

(e) By Act of Congress of March 26, 1804, that portion of the country ceded by France to the United States under the name of Louisiana lying South of the Mississippi Territory and of an East and West line to commence on the Mississippi River at the Thirty-Third Degree of North Latitude and to extend West to the Western boundary of said cession, was constituted a

territory of the United States under the name of Territory of Orleans.

(f) By Act of February 20, 1811, the inhabitants of all that part of the territory ceded under the name of Louisiana by the said treaty made at Paris on April 30, 1803, within the following limits, that is to say:

> "Beginning at the mouth of the river Sabine; thence by a line to be drawn along the middle of the said river, including all islands, to the thirty-second degree of north latitude; thence due north to the northernmost part of the thirty-third degree of north latitude; thence along the said parallel of latitude to the river Mississippi; thence down the said river to the river Iberville; and from thence, along the middle of the said river and Lakes Maurepas and Pontchartrain, to the Gulf of Mexico; thence bounded by the said gulf to the place of beginning, including all islands within three leagues of the coast . . . ."

were authorized to form for themselves a Constitution and State Government in the manner and under the conditions therein mentioned.

(g) Pursuant to said Act of February 20, 1811, the Constitution of Louisiana of 1812 was adopted by the representatives of the people within that part of the territory ceded by the treaty of Paris under the name of Louisiana, with the same boundaries set forth in said Act of Congress of February 20, 1811; and said Constitution of Louisiana, adopted by the repre-

sentatives of the people, was submitted to Congress and approved and ratified by it by Act of April 8, 1812, by which Louisiana was admitted as a Sovereign State into the Union on an equal footing with the original states.

(h) By Act of Congress of April 14, 1812, all that part of the said territory of Louisiana ceded by the French Republic within the following boundaries, to-wit:

> "Beginning at the junction of the Iberville with the river Mississippi; thence along the middle of the Iberville, the river Amite, and of the Lakes Maurepas and Pontchartrain to the eastern mouth of the Pearl river; thence up the eastern branch of Pearl river to the thirty-first degree of north latitude; thence along the said degree of latitude to the river Mississippi; thence down the said river to the place of beginning . . ."

became a part of said State of Louisiana, subject to the Constitution and laws thereof in the same manner, and for all intents and purposes as if it had been included within the original boundaries of the said State.

(i) Upon the admission of Louisiana as one of the Sovereign States of the United States by Act of Congress of April 8, 1812, on an equal footing with the original states, the State of Louisiana became vested with and exercised and at all times since said date

has exercised, full territorial jurisdiction and sovereignty in and over, and became vested with and held, and at all times since that date has held and now does hold, fee simple title to, all lands under all navigable waters within its territorial limits, all subject to the Constitutional powers of the United States.

SECOND AFFIRMATIVE DEFENSE

That, acting in conformity with and under its fee simple title and sovereignty and, at all times herein material, since the admission of Louisiana into the Union in 1812, the State of Louisiana has exercised continuous, undisturbed and unchallenged sovereignty over; and has had open, complete, notorious, peaceful, unquestioned, undisturbed and unchallenged possession of all the lands, minerals and other things underlying the Gulf of Mexico within the area described in the Complaint; and that such sovereignty and possession have been and are now being exercised and maintained subject to, consistently with and with full recognition of the Constitutional powers of the United States; and that as a result of the exercise of such sovereignty and possession by the State of Louisiana for more than one hundred years after the admission of the State into the Union in 1812 there has existed the general conviction that Louisiana had and has territorial jurisdiction and sovereignty over and fee

simple title to the said lands, minerals and other things in said area.

WHEREFORE, Defendant demands that this cause be transferred to the law side of this Court and prays for judgment dismissing the Complaint.

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,

F. TROWBRIDGE VOM BAUR,
Washington, D. C.

CULLEN R. LISKOW,
Lake Charles, La.

Of Counsel.

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OCTOBER TERM, 1949

No. 12, Original

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

MOTION FOR TRIAL BY JURY, AND STATEMENT IN SUPPORT OF MOTION

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General, State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.

CULLEN R. LISKOW,
Lake Charles, La.
Of Counsel.

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MOTION FOR TRIAL BY JURY

Comes now the State of Louisiana, without abandoning but re-asserting and re-urging all rights under its prior Motions herein filed, moves the Court that all issues of fact, insofar as this case presents an action at law, be tried by a jury; and that an order issue accordingly;

And, should the foregoing motion be opposed, Defendant prays that it be granted opportunity to be heard in oral argument and brief.

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General, State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,

F. TROWBRIDGE VOM BAUR,
Washington, D. C.

CULLEN R. LISKOW,
Lake Charles, La.
Of Counsel.

STATEMENT IN SUPPORT OF MOTION

The Seventh Amendment to the Constitution reads:

> "TRIAL BY JURY IN CIVIL CASES.—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

The Judiciary Act of 1789 established the courts of the United States and defined their jurisdiction.

> "Suits in equity shall not be sustained in any of the courts of the United States in any case where plain, adequate and complete remedy may be had at law." Act of September 24, 1789, U.S.C.A., Title 28, Section 384 (Judicial Code, Section 267).

On September 29, 1789, the same Congress which adopted the Judiciary Act proposed to the Legislatures of the several states the article afterwards ratified as the Seventh Amendment of the Constitution of the United States.

Title 28 U.S.C.A., Section 1872 (old Section 343), provides that:

> "In all original actions at law in the Supreme Court against citizens of the United States, issues of fact shall be tried by a jury."

The words "in suits at common law" which are contained in the Seventh Amendment of the United

States Constitution have been interpreted by this Court to mean all legal rights remedial at common law. *Root v. Railway Co.*, 105 U. S. 207 (1881); *Fenn v. Holme*, 21 How. 481 (1858); *Parsons v. Bedford*, 3 Peters 446 (1830).

In the case of *Root v. Railway Company*, *supra*, this Court stated that suits at "COMMON LAW" meant what the Constitution denominated in the third Article, under the term "LAW"; that cases at common law, as thus denominated, not merely included suits which the common law recognized among its old and settled proceedings but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized and equitable remedies administered.

Although the Judiciary Act of 1789 has been held to be declaratory only of the principles of general equity jurisprudence and not intended to abridge the jurisdiction of the court as one of full equity powers, this Act in connection with the constitutional provisions as to trial by jury was construed as follows in the leading case of *Hipp v. Babin*, 19 How. (U. S.) 271, 278 (1856):

> "Whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by a jury."

This interpretation of the effect of the constitutional provision as to trial by jury has been followed, cited and noted by a long line of decisions in the Supreme Court of the United States down to the present

time, and is the final basis of practically all these decisions as to the abridgment of the constitutional right to trial by jury. *Wright v. Ellison*, 1 Wall. 22; *Thompson v. R. R.*, 6 Wall. 137; *Ins. Co. v. Bailey*, 13 Wall. 616, 620; *Oelrichs v. Spain*, 15 Wall. 228; *Grand Chute v. Winegar*, 15 Wall. 355; *Root v. Railway Co.*, 105 U. S. 189, 212; *Killian v. Ebbinghaus*, 110 U. S. 568; *Buzard v. Houston*, 119 U. S. 347; *Whitehead v. Shattuck*, 138 U. S. 151; *Scott v. Nealy*, 140 U. S. 109; *Schoenthal et al. v. Irving Trust Co.*, 287 U. S. 92, 53 S. Ct. 50.

In the case of *Whitehead v. Shattuck*, 138 U. S. at page 151, the court said:

> "The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury."

Mr. Justice Black, speaking for the minority, in the case of *Galloway v. U. S.*, 319 U. S. 372, 63 S. Ct. 1077, 1091, said:

> "In 1789, juries occupied the principal place in the administration of justice. They were frequently in both criminal and civil cases the arbiters not only of fact but of law. Less than three years after the ratification of the Seventh Amendment, this Court called a jury in a civil case brought under our original jurisdiction. There was no disagreement as to the facts of the case. Chief Justice Jay, charging the jury for a unanimous Court, three of whose members had sat in the Constitutional Convention, said: 'For as, on the one hand, it is presumed, that

juries are the best judges of facts; it is, on the other hand, presumable, that the court(s) are the best judges of law. But, still, both objects are lawfully within your power of decision.' *State of Georgia v. Brailsford*, 3 Dall. 1, 4, 1 L. Ed. 483. * * * "

* * * * *

"The language of the Seventh Amendment cannot easily be improved by formulas. The statement of a district judge in *Tarter v. United States, D. C.*, 17 F. Supp. 691, 692, 693, represents, in my opinion, the minimum meaning of the Seventh Amendment:

" 'The Seventh Amendment to the Constitution guarantees a jury trial in law cases, where there is substantial evidence to support the claim of the plaintiff in an action. If a single witness testifies to a fact sustaining the issue between the parties, or if reasoning minds might reach different conclusions from the testimony of a single witness, one of which would substantially support the issue of the contending party, the issue must be left to the jury. Trial by jury is a fundamental guaranty of the rights of the people, and judges should not search the evidence with meticulous care to deprive litigants of jury trials.'

"The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that Constitutional right preserved. Either the judge or the jury must decide facts and to the extent that we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights may be peculiarly difficult, for here it is our own power which we must restrain. We should

> not fail to meet the expectation of James Madison, who, in advocating the adoption of the Bill of Rights, said: 'Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; * * * they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of right.' "

The right to a trial by jury in the Supreme Court of the United States is, therefore, not without precedent. Mr. Justice Black mentioned the trial by jury that was resorted to in the case of *Georgia v. Brailsford, et al.*, 3 Dall. 1. There have been at least two other cases, *Oswald v. State of New York* and *Catlin v. State of South Carolina*. (See Supreme Court of U. S., by Hampton L. Carson, 1891, Vol. 1, p. 169, Note 1.)

A suit of this kind by the United States against the State of Louisiana, insofar as the United States declares that it is the holder of fee simple title to lands underlying the Gulf of Mexico, within the boundaries of the State of Louisiana, is essentially an action at law against the people of Louisiana in their collective sovereign capacity.

The provisions of Title 28 U.S.C.A., Section 1872 (old Section 343), apply to sovereign states in original actions at law in the Supreme Court of the United States.

The State of Louisiana is holding said lands in controversy for its citizens, and this action constitutes a proceeding against the citizens of the state.

When this Court in *McCready v. Virginia*, 94 U. S.

391 (1876) held that each state owns the beds of tide waters within its jurisdiction and the tide waters, themselves, it announced this principle:

> "For this purpose the State represents its People, and the ownership is that of the People in their united sovereignty."

This suit, insofar as it is an action at law, involves title to the beds of tide waters within the jurisdiction of the State of Louisiana. The State represents its People in claiming fee simple title thereto, and in denying title in the United States. The suit by the United States is, therefore, against the People of Louisiana who are its citizens. Hence, the State of Louisiana, Defendant here, by the Seventh Amendment to the Constitution and by the force of U.S.C.A. Title 28, Section 1872 (old Section 343) is entitled to a trial by jury and the motion should be granted.

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.

CULLEN R. LISKOW,
Lake Charles, La.

Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted]. 51

No. [redacted], Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

PETITION FOR REHEARING

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General, State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,

F. TROWBRIDGE VOM BAUR,
Washington, D. C.

CULLEN R. LISKOW,
Lake Charles, La.

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UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

PETITION FOR REHEARING

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The State of Louisiana, acting pursuant to Rule 33 of the Rules of this Court, hereby petitions the Court for a rehearing of its decision herein rendered on June 5, 1950, this petition being supported by the following grounds:

I.

The Court erroneously assumed jurisdiction of this suit by the United States against the State of Louisiana, an original proceeding, as was pointed out in Defendant's special Objections and Motions on

Jurisdictional grounds, which are now urged again in support of this petition for rehearing.

II.

The decision is not based on any provision of the Constitution or any laws of the United States, but is violative of the Constitution and of the property rights of the States of the Union secured by treaty, the supreme law of the land.

III.

The decision violates the rights of Louisiana in that:

(a) Louisiana by the Act of April 8, 1812 was admitted into the United States "on an equal footing with the original States, in all respects whatever;"

(b) It confiscates property rights flowing from the plain terms of the Treaty between the United States and Great Britain of April 11, 1783 whereby there were relinquished to the original States by name "all claims to the government, proprietary and territorial rights of the same, and every part thereof";

(c) Which Treaty was made the "supreme law of the land" (U. S. Constitution, Art. VI, Cl. 2);

(d) And "the people of each State became themselves sovereign; and in that character hold the abso-

lute right to all their navigable waters and the soils under them for their own common use" *(Martin v. Waddell* (1842), 16 Pet. 367);

(e) "There could be no acquisition of territory made by the United States distinct from or independent of some one of the States" *(Harcourt v. Gaillard* (1827), 12 Wheat, 523);

(f) It being the true rule, settled long ago in *Pollard's Lessee v. Hagan* (1845), 3 How. 212, when "by the preceding course of reasoning" the Court "arrived at these general conclusions: first, the shores of navigable waters and the soils under them were not granted by the Constitution to the United States, but were reserved to the States, respectively. Secondly, the new States have the same rights, sovereignty and jurisdiction over this subject as the original States." The same rule in *Shively v. Bowlby* (1893), 152 U. S. 1, having been emphasized by saying "the new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tidewaters and in the lands under them within their respective jurisdictions";

(g) And it was recognized in *Pollard's Lessee v. Hagan*, that "this right of eminent domain over the shores and soils under the navigable waters for all

municipal purposes belongs exclusively to the States within their respective territorial jurisdiction and they, and they only, have the constitutional power to exercise it"; and because in that case this Court also recognized that Alabama (and Louisiana has the same right) had "extended all her sovereign power into the sea", . . . "subject to the Constitution of the United States and the laws which shall be made in pursuance thereto."

IV.

The decision contravenes the provisions of the Treaty between the French Republic and the United States of America, signed at Paris, on April 30, 1803, in which the territory of Louisiana was ceded to the latter named sovereign. Under that Treaty, as interpreted by the Court in *New Orleans v. United States*, 10 Pet. 662, the United States acquired no property rights except title to vacant lands which it could then sell and convey. To the inhabitants of the territory devolved the ownership of all other non-alienable property of a public nature, including the "rivers, the *sea* and its shores" (p. 720, id.)

V.

The decision is confiscatory, in that the State of Louisiana is thereby deprived of sovereign property

rights to lands within its original boundaries and by it held in fee simple title since 1812. The Act of Congress of April 8, 1812, admitting Louisiana into the Union, recited that said state was "bounded by the said gulf (of Mexico) . . . including all islands within three leagues of the coast." By adopting the low-water mark along the coast of Louisiana as the terminus of state-owned property, large areas of sovereign state lands within the original territory of Louisiana are exiled and brought within the sphere of exclusive federal control.

VI.

Once the Court brushed the question of title aside, no actual justiciable issue was before it. Louisiana admitted the paramount rights, dominion and power of the United States in the area, to the full extent of its powers under the Constitution, laws and treaties of the United States.

VII.

The decision is erroneous in failing to give weight to *Toomer v. Witsell*, 334 U. S. 385, and in attempting to differentiate the rule in that case by making reference to "conflicting federal policy." That case recognizes the right of a state to control a valuable resource in the marginal sea in the absence of federal legislation. In this case, as in *Toomer v. Witsell*, no federal

legislation existed. The two cases are strikingly parallel. The Court erroneously applied Louisiana's admission as a denial when it said, "The question here is not the power of a state to use the marginal sea or to regulate its use in absence of a conflicting federal policy; it is the power of a state to *deny* the paramount authority which the United States seeks to assert over the area in question." Merely to allege that the paramount rights, dominion and power of the United States in the area are subject to the Constitution, laws and treaties of the United States, is not to deny such paramount authority.

VIII.

The Court erred in saying that "The United States, acting through its Attorney General . . . has authority to assert claims of this character. . . ." While the Attorney General has authority to appear in court to urge claims on behalf of the Federal Government, he cannot decide what governmental powers will be exercised or asserted, *when assertion of power* can only be made by Congress.

IX.

The statement made in the Court's opinion that "*United States v. California*, 332 U. S. 19, controls this case," is an insupportable conclusion; for example:

(a) California *denied* the paramount authority of the United States in the area, conceding only that it had regulatory powers there, while Louisiana *admitted* the paramount rights, dominion and power of the Federal Government in the area, to the full extent of its powers under the constitution, laws and treaties of the United States;

(b) While California and Louisiana both asserted fee simple title to the lands, minerals and other things involved in the respective suits, Louisiana did not follow California's course in contending that "the state alone had the jurisdiction to regulate its own property" in the area (California's Brief, p. 104; Appendices to California's Brief, p. 159). Thus the Court indicated in the *California* case that California had sought to "block off" the marginal sea for its own use (332 U. S. 19, p. 32). Nothing in Louisiana's answer, brief and argument can be construed as an intent by this state to exclude the United States from exercising any constitutional right, power, control or authority in the area, provided the same is first asserted by Congress;

(c) Unlike California's claim of ownership, Louisiana's title stems from a treaty of cession, and proprietary rights which the United States never acquired were granted to the inhabitants of the ceded territory

to be vested in the State (Louisiana) to be admitted into the Union under the principles of the Federal Constitution;

(d) Both California and Louisiana pleaded lack of justiciable controversy, but the two pleas were based upon entirely different propositions. As will later be shown in this petition, the Court gave no consideration to Louisiana's plea in that respect.

X.

Plaintiff has shown no controversy, or right to relief, with respect to the paramount rights, dominion and power of the United States. And plaintiff is not entitled to judgment on the issue of title, for this Court has held, in effect, that the United States does not have title to lands beneath the marginal sea. In the *California* case, plaintiff asserted fee simple title to the marginal sea, but this Court flatly rejected that claim by refusing to include the words "of proprietorship" in its decree. This is clearly pointed out by Mr. Justice Frankfurther's opinion herein. And, as set forth before, the opinion is erroneous in requiring a decree to be rendered that must be based on title while, at the same time, holding that title is not at issue.

XI.

In refusing Louisiana a trial and holding that the issue "does not turn on title or ownership in the con-

ventional sense", and at the same time appropriating proprietary rights to the United States by virtue of its governmental powers and authority, the effect of the decision is to confiscate property of the State and its citizens in their united sovereignty by judicial decree, all in violation of the Constitution.

XII.

The issue of title was squarely presented to the Court, and no other justiciable issue was triable. This action, so far as fee simple title is concerned, is, in essence, an action for the recovery of real property, that is, an action in common law ejectment. Under the Common Law of 1776, such an action was triable by jury, and it is triable now by jury under the Seventh Amendment of the Constitution. The Court erred, first, in pretermitting the only real issue involved in the case, namely: title, and second, in refusing to grant a trial by jury.

XIII.

The decision herein is particularly in error in failing to give any consideration to the defense and argument that there is no law of Congress under which any of the acts being performed by Louisiana could be exercised under federal permit or lease. The Court assumes a controversy to exist, but none does or can

exist, until and unless Congress passes legislation which gives the United States the right to do what the State of Louisiana is authorized to perform by its legislature, and thereafter Louisiana continues to act and federal and state powers come into actual conflict.

XIV.

While the complaint in the action relates to lands, minerals and other things of value underlying the Gulf of Mexico, the opinion treats the assertion of federal power as though it were limited to oil. The decision, therefore, presents the shocking result that would follow should the Attorney General rather than Congress be regarded as holding the authority to translate a dormant right into a grant of power to be exercised.

XV.

The decision of the Court is wholly illogical, in that a money judgment, through a financial accounting, is required in order that the United States may protect and control the area involved and serve "national interests, national responsibilities, national concerns." The fact that "national rights must therefore be paramount in that area" does not mean that political supremacy is a thing to be measured in terms of dollars and cents.

XVI.

It is submitted that the decision is not only erroneous but unconscionable, illogical, unenforceable and impossible in requiring a financial accounting. Reasons follow:

(a) An accounting for money received from real property can only be demanded by the owner. The United States was not declared to be the owner of the lands and resources involved in the cause, nor was the State of Louisiana held to be a trespasser.

Fundamentally a financial accounting can be due only to one having a proprietary right or interest. In this respect the opinion and decision are contradictory within themselves as the Court said that "the issue in this class of litigation does not turn on title or ownership in the conventional sense." That statement, of course, is erroneous as the issue does turn on title or ownership when one deals with the right to produce and appropriate to one's own use a valuable natural resource or other bounties of the area involved.

(b) A financial accounting has no relation whatever to the obligations of the United States to protect the area of the marginal sea. There is no legal or logical ground for saying that the State of Louisiana should be required to account to the United States be-

cause of the latter's obligations in the realm of external sovereignty.

(c) According to the opinion, title or ownership is not at issue and, therefore, the United States, not being declared the owner of the soil or minerals therein, can recover nothing from Louisiana for revenues derived therefrom.

(d) If it could or should properly be held that the State of Louisiana must account; if title could be vested in the United States because the State has none, good conscience would require the accounting to be made to those who show financial loss and who paid the State by acting on the decisions of this Court that have been in the books for more than a century supporting State ownership of all lands beneath navigable waters within their respective jurisdictions.

The present decision, by granting the relief prayed for, is contrary to that jurisprudence although there is nothing in the decision upon which the United States can say that a proprietary right in it has been recognized by the Court. The proprietorship is actually the basic question to be decided.

CONCLUSION

It is earnestly submitted that a rehearing of the Court's decision herein is warranted on the foregoing

grounds. And it is urged that the decision be reversed on said grounds; or that, in the alternative, the petition be granted and the case set for further argument.

Respectfully submitted,

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,

F. TROWBRIDGE VOM BAUR,
Washington, D. C.

CULLEN R. LISKOW,
Lake Charles, La.

Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 51

No. 6, Original

UNITED STATES OF AMERICA, Plaintiff

versus

STATE OF LOUISIANA

BRIEF OF DEFENDANT OPPOSING PLAINTIFF'S MOTION FOR JUDGMENT AND SUPPORTING DEFENDANT'S MOTION TO DISMISS AND OTHER DEFENSES.

BOLIVAR E. KEMP, JR.,
Attorney General,
State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

L. H. PEREZ,
STAMPS FARRAR,
New Orleans, Louisiana

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.

CULLEN R. LISKOW,
Lake Charles, Louisiana
Of Counsel.

Sendker Printing, 307 Chartres Street, N.O., La.

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 12, Original

UNITED STATES OF AMERICA, Plaintiff

versus

STATE OF LOUISIANA

BRIEF OF DEFENDANT OPPOSING PLAINTIFF'S MOTION FOR JUDGMENT AND SUPPORTING DEFENDANT'S MOTION TO DISMISS AND OTHER DEFENSES.

JURISDICTION

Plaintiff alleges jurisdiction for this Court under Article III, Sec. 2, cl. 2 of the Constitution.

That jurisdiction has been denied before by Defendant's special Objection and Motions on Jurisdictional Grounds. Although Defendant, in responding to the present Motion for Judgment, has put at issue all of Plaintiff's claims, it has consistently reserved and reasserted the Motions and Objections that were filed in advance.

While this Court overruled the first Motion on Jurisdictional Grounds, that action was without written reasons and raises the presumption that full decision was reserved to be included in the Court's final opinion. As

this brief, brought forth by Plaintiff's Motion for Judgment, also reserves all objections that were filed before, the arguments that were made in support of those objections should need no repetition; but still Louisiana insists that those arguments are sound and that jurisdiction should be denied.

QUESTION PRESENTED

If Plaintiff's brief, under this heading, [redacted] by the words "and ownership of the lands, minerals and other things" intended to say that the issue here is limited to its claim to fee title, the explanatory paragraph could be accepted for this suit. But, in that event, Plaintiff's case would immediately fall, as it actually has abandoned its "title" claim and its brief does not even argue in its favor. If the quoted words mean something else, as the brief later indicates, then there are several different questions presented for decision. And those questions will be developed in the presentation of Defendant's side of the case to deny Plaintiff a proprietary interest in the area described, and therefore deny the decree that is prayed for.

PLAINTIFF'S MOTION FOR JUDGMENT

Plaintiff's first Motion for Judgment was denied on October 10, 1949. By its second Motion of the same kind, filed while there was pending Defendant's Motion for Trial by Jury, the United States first moved for judgment as prayed for; but in the accompanying statement suggested that judgment could be appropriately entered "forthwith on the pleadings" and, therefore, without trial and without argument. While Plaintiff then asked this Court to not only deprive Defendant of its constitutional right to trial by jury, but of its constitutional

right to any trial, and thereby to violate the "cherished judicial tradition embodying the basic concepts of fair play", *Morgan v. United States*, 304 U.S. 1, 22, this Court fairly rejected the suggestion but has fixed the Motion for argument in response to Plantiff's alternative request.

The Motion and its accompanying Statement proceed on the assertion that the Defenses in the Answer are "insufficient in law". But the Motion asks for judgment on **Plaintiff's** case. So, the Statement overlooks the fundamental requirement that, before the Answer can be considered sufficient or "insufficient in law", the Complaint or Petition must be found to set forth a valid and legal claim. **And that burden is on the United States.**

Plaintiff's Statement offers the opinion that there is here "no legal question which was not decided adversely to the State's position in the decision of the Court in *United States v. California*, 332 U.S. 19". But, that suggestion is entitled to no consideration until the defenses have been given full attention and until they have been accorded their deserved weight, after when Plaintiff's Motion will fall. For this case is different from *United States v. California* in that the Defenses bring forth objections that were not offered there or decided in the light of factual and historical circumstances; and contrary assumptions by Plaintiff in its Motion and in its brief can not change the situation. And this case is also quite different from California's, for Louisiana is happily able to cite a decision of this Court, in a suit by the United States against citizens of Louisiana, rendered more than a hundred years ago and denying a federal claim of the same sort which the Com-

plaint attempts to assert here.* But Plaintiff's brief, with the overconfidence which it exhibits, proves that the decision has never been brought to its attention. For that case, insofar as Louisiana is concerned and as it later will appear, really denies Plaintiff's claim which was not a new one when *United States v. California* was decided and is not a new one now.

As Plaintiff's Motion asks for judgment on the pleadings, it disputes the effect of the Answer and all the defenses there made. It, therefore, puts the whole case at issue so far as it can be heard without the introduction of evidence and without consideration of Defendant's Motion for Trial by Jury. And, consequently, the Motion for Judgment includes and calls for a decision on Defendant's First Defense which is a Motion to Dismiss for lack of an actual justiciable controversy and for failure of the Complaint to set forth a claim on which relief could be granted.

THE PLEADINGS

Article II of the Complaint alleges that at all times material "Plaintiff was and now is the owner in fee simple of, or possessed of paramount rights in, and full dominion and power over, the lands, minerals, and other things underlying the Gulf of Mexico, lying seaward of the ordinary low-water mark on the coast of Louisiana". That part of the allegation contains the disjunctive claims to ownership in fee simple **or** paramount rights and full dominion and power over the lands, minerals and other things underlying the Gulf. These disjunctive allegations form the basis of this suit.

The same Article recognizes the area sued upon as

* *New Orleans v. United States, infra.*

being within the territorial boundaries and limits of the State of Louisiana, as it refers to the property as extending seaward 27 marine miles and as being bounded on the east by the eastern boundary and on the west by the western boundary of the State; and being within boundaries, so alleged, of the State, extending that distance seaward, the property is admittedly within the State and part of it.

Article III recites that the State claims some right or interest in these lands and other things, and Article IV states that it has leased lands for the discovery of petroleum and other mineral deposits pursuant to Acts of the Louisiana Legislature authorizing such contracts.

Article V refers to the granting of mineral leases by the State; and the payments of sums of money therefor; and sets forth that wells have been drilled for the discovery of hydrocarbon substances.

Article VI is a denial that there is any title to or interest in this area vested in the State of Louisiana, although it is again admitted that the State possesses some governmental powers because the property is allegedly in the same class as lands belonging to the United States "within the lawful territorial jurisdiction of the State".

Article VII alleges that the State has denied the rights and powers of the United States in the areas described and has claimed full and complete ownership for itself and will continue to do so unless the rights of the United States should be established and declared; and the Article continues to say that the State and others acting under it would continue to take minerals and "other things of value in the area, in violation of the

rights of the United States" unless relief should be granted. (Emphasis added).

The prayer is for a decree declaring and adjudging the rights of the United States as against the State; enjoining the State and all persons claiming under it from continuing "to trespass upon the area in violation of the rights of the United States"; the prayer also asking for an accounting for sums of money derived since June 23, 1947.

The Answer reserves all motions heretofore filed and by the "First Defense" moves to dismiss the Complaint for failure to state a claim and because it presents no justiciable controversy between the United States and the State of Louisiana; that Defense requiring detailed explanation for full understanding of it which will be reserved for the arguments that will follow. But it can be said now that the arguments will readily prove that the ideas upon which the Defense is based have not been decided before in favor of the United States. While it deals with justiciable controversy, it relates more to the lack of any cause of action in Plaintiff to prosecute this suit; and the point is argued in the light of the pronouncements of this Court in *United States v. California* and not without their guide as was the burden of Defendant in that suit.

The Second Defense is a categorical answer to the Articles of the Complaint. It denies jurisdiction and denies that Plaintiff ever was or is now "the holder of fee simple title to such lands, minerals and other things underlying the Gulf of Mexico within the said limits of the State of Louisiana". It admits that the State of Louisiana claims to be, and alleges that it is, the holder of fee simple title to the area described; but it

also admits that it is subject to Plaintiff's paramount rights in and full dominion and power over the lands, minerals and other things underlying the Gulf to the extent granted by the Constitution.

The First Affirmative Defense continues to deny Plaintiff's claim to fee simple title or paramount rights of a proprietary nature. And, affirmatively, it sets forth that the State of Louisiana has title in fee simple to the bed of the Gulf of Mexico within the limits described in the Complaint, and its muniments of title are listed in their order. But again Louisiana admits that its title is subject to the paramount, constitutional powers and dominion of the United States.

The Second Affirmative Defense avers that the State of Louisiana has exercised continuous and unchallenged sovereignty over and peaceful possession of the lands and other things underlying the Gulf of Mexico, in accord with its title, and always with full recognition of the constitutional paramount powers of the United States. And that Defense, like the others, denies that the United States is the owner in fee, and denies that its constitutional powers include proprietary rights or authority to search for and produce minerals and other things of value on and under the bed of the Gulf within the area which the Complaint describes.

ARGUMENT

Plaintiff's brief (page 10) begins its argument with the gross misstatement that "Louisiana presents no substantial defenses which were not raised by California". And the idea is continued on page 11 by the erroneous assertion that "Louisiana makes no real attempt to differentiate its case from that of California". But it will

appear as this brief progresses, that some of the Defenses here presented were not offered for this Court's consideration in that case; and Louisiana can not be made to suffer if or because errors were made before.

The First Defense, not even suggested by California, should dispose of this case by dismissal, although of necessity the arguments will reach all phases of the suit.** And Louisiana believes that if this Court takes jurisdiction it will exercise it in the usual way when a plaintiff has the primary burden of a law suit, a burden which the United States can not carry here.

FIRST DEFENSE

This Defense does not concern, nor does it depend upon, title claimed by the State of Louisiana in a later part of its Answer. For the First Defense deals with the Complaint; it is in the nature of a General Demurrer and has for its foundation the charge that the allegations of the Complaint, and the inferences drawn from them, are "insufficient in law" to give Plaintiff the relief prayed for.

** Footnote on page 8 of Plaintiff's brief says:

"No question is here raised as to the **boundary** of Louisiana, . . . The issue here relates to rights in the submerged lands seaward of the ordinary low water mark, whether they be within or without the State's boundary". And no question could be raised when the Complaint particularly identifies the area sued upon as extending 27 miles seaward and being within the boundaries of Louisiana. But for no apparent reason, page 8 of the brief cites an opinion of Louisiana Attorney General's Office directed to private parties in 1934 having no bearing on anything in this case and having no legal force in Louisiana or elsewhere. It merely referred to the Enabling Act of 1811 which, like the others, defined the landed portion of the State within which lived the inhabitants who were to form a state which would have sovereign and littoral rights in the sea. Part II in Plaintiff's brief also discusses Louisiana's boundary, but has no apparent purpose except to say in effect that whatever Louisiana has the United States would take away.

Defendant, throughout, admits the governmental paramount rights and powers of the United States, but always denies that they could support the **prayer** of the Complaint.

So, what first requires this Court's attention under the Complaint and the First Defense is not whether **Louisiana** has title in fee, but **whether the United States** can show title or constitutional power which would include the proprietary right to take and use minerals **and other things of value** in the Gulf to the exclusion of the State and its citizens. And to that end the argument for the First Defense will be divided into three, partly alternative, sections:

(a) While Plaintiff pins its hopes on *United States v. California*, the First Defense postulates that the Court there did not decide that the United States had title to any part of the bed of the Pacific Ocean; and here it will be demonstrated that the United States could make no serious argument in favor of title in fee and that the decision in *United States v. California* does not make one in its behalf.

(b) The second argument accepts the announcement in *United States v. California* that the United States has paramount rights and powers in and over the bed of the sea along the coastal states; but it denies that such rights and powers, necessarily restricted by constitutional limits, carry with them the proprietary right to search for and produce, or to grant licenses to search for and produce, oil or other minerals or other valuable resources on and under the bed of the Gulf of Mexico. And, the chapter contends, that as the governmental powers are not at issue, there is no actual justiciable controversy up for decision and no basis for the relief prayed for.

(c) In the third chapter, alternative argument will accept as a premise, but only *arguendo*, that some governmental power of the United States could include the right to take and use, or to authorize the taking and use of, the minerals and other things of value in the Gulf, to the exclusion of Louisiana; but it denies that any such dormant power or right ever has been exercised by action of the only branch of the government with such authority, Congress; and it argues, therefore, that the majority of the findings of this Court in *United States v. California*; and the declaration here prayed for, constitute and would be only abstractions beyond the function of this Court for that they present no actual and justiciable controversy and give Plaintiff no ground for relief.

And, while there may be some necessary repetition or some additions to the basic thoughts, the arguments will be presented in that order.

(a)

United States does not have fee simple title.

Article II of the Complaint alleges that Plaintiff is "the owner in fee simple of, or possessed of paramount rights in, and full dominion and power over, the land, minerals, and other things underlying the Gulf of Mexico" throughout an area which the Complaint defines as being within the boundaries of Louisiana.

When the United States of America acquired its alleged title; **from whom** it was purchased or taken by conquest; **how** such title in fee simple is claimed to have vested, the Complaint does not say. It presents only the conclusions in the disjunctive that the United States either owns the area in fee simple, **or** is possessed of

paramount rights in and full dominion and power over it.

Nothing could demonstrate more fully that the United States **has no evidence of title** than the Complaint's failure to set it forth. And arguments against the allegation of title would not be so apparent were it not for Plaintiff's brief in *United States v. California.* It might here be said, par parentheses, and it will be proved later on, that Louisiana has more for answer than did California in that suit. And, contrary to page 15 of Plaintiff's brief, Louisiana does stand on a "better footing" than California, particularly to the extent that the method now employed will evidence the true nature of this case more clearly than did the defenses in that suit.

While Plaintiff's brief now makes no claim to title, in *United States v. California* the rights urged were based on the nebulous argument that because of certain sovereign powers in the Federal Government "ownership should be attributed" to it "if it is to be attributed to sovereignty at all". Plaintiff's brief, California case, page 89. And there Plaintiff assumed that whatever rights the United States has in the marginal sea "are derived exclusively" from the national sovereignty in international affairs.

Relying wholly on the California decision, Plaintiff now by the use of the word "ownership" attempts by some magic or alchemy to transform power into proprietary rights, overlooking or trying to hide the idea that title or proprietorship is necessary for the decree which it seeks.

The postulate that fee simple title could not now be successfully claimed by the United States by virtue of sovereignty or otherwise, should it attempt to revive that allegation of the Complaint, can be supported with

little difficulty by three binding forces. **First**, not only the present brief but the Motion for Judgment practically abandons such claim when it is averred that "the United States has asserted its rights" and when there is silence on the question of title. Without repeating the arguments made in *United States v. California*, Plaintiff still places its entire faith in and sole reliance on that decision; but this brief will demonstrate that the decision could not and does not support a claim to fee title or to other proprietary rights.

Secondly, this Court in *United States v. California* actually adjudged that the United States was not the owner, in fee simple, of the bed of the sea off the coast of that State. Proof of that result is abundant. The Complaint, in that case, had alleged that the United States "is the owner in fee simple of, or possessed of paramount rights and power over" the lands, minerals and other things of value under the waters of that sea; language like that used in this suit against Louisiana. But the **decision** made no allusion to a fee simple title in the general government. The decree (332 U.S. 804) upheld its claim to paramount rights and power, but it treated the disjunctive claim to title with disdain. So, in the final analysis, the alleged fee simple title in the United States was not secured, but, in effect, was denied. For this Court well knows that the record well shows that the form of decree presented pursuant to the Court's suggestion, was originally so worded by Plaintiff as to give the United States proprietary rights or title in and to the area in suit; but that part of the suggested decree was ordered stricken and was omitted from the decree issued by the Court so that it was thereby adjudged that proprietorship was not in the United States. Indeed, the opinion and decree affirmatively gave nothing to

the United States beyond a recognition of its paramount governmental powers. And the later case of *Toomer v. Witsell*, 334 U.S. 385, discussed more fully further on, construed *United States v. California* against exclusive federal power over and against federal title to the marginal sea when this Court said "that such is neither the holding nor the implication of that case" (p. 393).

Thirdly, and more important, this Court, in a decision[1] not mentioned in *United States v. California* either in the briefs or the opinion, and dealing with the State of Louisiana and its sovereign rights and titles, specifically held that the United States, by virtue of its sovereignty, never did acquire proprietorship of public places or areas within the limits of Louisiana, like roads or streets or the rivers or the sea. That decision, as between the United States and this State, adjudicated that the United States had no title to any part of the original territory of Louisiana except vacant lands subject to alienation.

Whether the decision just mentioned will uphold the Affirmative Defense of fee simple title in Louisiana, is not within the frame of this preliminary argument. That claim, along with cases that have been brought to the Court's attention before, such as *Pollard's Lessee v. Hagan*, 3 How. 212, *Martin v. Waddell*, 16 Pet. 367, *Harcourt v. Gaillard*, 12 Wheat. 523, and others, including the important case of *Shively v. Bowlby*, 152 U.S. 1, will be discussed more appropriately with the Second and Affirmative Defenses. The First Defense now presented is of negative character; it first

[1] *The Mayor, Aldermen and Inhabitants of New Orleans v. The United States*, 10 Pet. 662, 9 L. Ed. 573, generally and herein referred to as *New Orleans v. United States*.

denies the allegation of fee simple title in the United States. And in further support of such denial of title, Defendants offers *New Orleans v. United States*, *supra*, as a controlling authority adopted by this Court more than a hundred years ago.

The case was on appeal by the Mayor, Aldermen and Inhabitants of New Orleans, who were considered as representatives of the State sovereignty, from a decision against them by the District Court of the United States for East Louisiana. The suit, like this one, originated by petition on the part of the United States claiming fee title or superior proprietary rights to certain public property on the banks of the Mississippi River (known in Spanish parlance as a quay), and seeking an injunction against the officials who had threatened to sell or dispose of it.

While the importance of the suit, its judicial finality and control, will be more fully advanced when the question of State title is reached, a short resumé should be sufficient to deny the United States fee title to any part of the Gulf of Mexico; although the Court can now find more detailed argument, if it thinks it important, in the later chapter on Louisiana's title under the Treaty of 1803.

While the property involved was a public quay, the Court found that legally and historically it had been of the same class of public things held in trust for the people as the "rivers, the sea and its shores" and "streets, highways . . . and other public places" (p. 720) so that neither the King of Spain nor France could "alien such lands". (p. 726). And the conclusion was that as a result of the Treaty of Cession and upon the admission of Louisiana as a State, the United States held title

only to those vacant or public lands which theretofore "the King could sell and convey"; but that the public things and property remained in Louisiana in trust for its people. (*Borax, Ltd. v. Los Angeles*, 296 U.S. 10, and other cases there cited settle the rule that such public or vacant lands do not extend below navigable waters). And, it was clear, said the Court in the New Orleans case, that title was not acquired by the United States under the Treaty of 1803, nor did it vest by the Constitution, because:

> "All powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the states and the people."
> 10 Pet. p. 737.

And the final decision was:

> "It is enough for this court, in deciding the matter before them, to say, that in their opinion, neither the fee of the land in controversy, nor the right to regulate the use, is vested in the federal government . . ."
> 10 Pet. p. 737.

While Plaintiff's brief assumes that the Treaty of 1803 "saved only the title to property which was privately owned" and, therefore, that all rights in the marginal sea "belonged solely to the United States" (pp. 11, 12), confidence in those assertions is flatly denied by *New Orleans v. United States*. For it there was decided that the United States did not acquire under the Treaty of 1803 any property rights or any title except title to the vacant lands which it could then sell or convey.

As the legal principles supporting that decision equally apply in this suit, this Court by that precedent must say that the United States did not acquire fee

simple title to the area described in its Complaint and did not acquire any other proprietary right; and if claim to title, or other claim that would carry proprietorship, is still intended in this case, the claim should be denied.

(b)

The constitutional paramount rights and powers of the United States do not include proprietary interest in the minerals and other things of value within territorial limits of Louisiana.

In *United States v. California*, this Court upon reaching the merits of the case, cast aside the issue of title for one of "paramount rights" and stated that the crucial question on the merits is not merely who owns the bare legal title to the lands under the marginal sea. For, it was said, the United States claims its rights in two capacities "transcending those of a mere property owner". So, with Plaintiff's claim to fee title out of the picture, the First Defense opens the question not "whether the State or the Federal Government has" paramount rights and powers in the sea, but **whether the proprietary rights Plaintiff seeks are within the orbit of the international and constitutional powers and rights of the United States.** And further on, in a separate chapter, it leads to the alternative discussion of whether there has been any exercise of dormant power by constitutional method or means.

So far as the opinion in *United States v. California* concludes that the United States, rather than the State, has paramount rights and powers in international affairs and as to some that are internal, such as commerce interstate, this brief is in entire agreement with the thoughts there expressed.

But, the Defense challenges the idea that such rights and authority justify the relief asked for in Plaintiff's prayer. For, Louisiana denies that the constitutional and other sovereign powers, which need no pronouncement by this Court, could include rights which are proprietary in nature, and which would be of interest to the central government only for its internal and fiscal growth. Because of that challenge, attention has been called to the details of the claim, and there will appear later some discussions around the resources and commodities which the Complaint attempts to take from Louisiana. For it is obvious that the decree in *United States v. California*, and some of the implications that were attached to "paramount rights and powers", were reached without disclosure to the Court of the nature of the "minerals and other things" underlying the waters adjacent to the shores of California.

The later allusions to the decision in *United States v. California* will be in the light of the allegations found in the present Complaint and of the realistic and practical side of the activities which Plaintiff would enjoin; and they must be kept in mind.

And, throughout these discussions, the locus of the claim should be considered. In Articles II and VI of the Complaint, the area involved is placed within the boundaries and limits and territorial jurisdiction of Louisiana; and Plaintiff's brief to the contrary, the boundaries are so given in Article II, and the other Article recites that Louisiana possesses powers over the area to the same extent as it would over lands of the United States "within the lawful territorial jurisdiction of the State".

While the suit of the federal government is levelled

principally at petroleum, or oil, it also deals with "lands, minerals and **other things** underlying the Gulf of Mexico". (Emphasis added). And a decree, as prayed for by Plaintiff, would transfer to the United States proprietary right in all that is claimed. "Lands" includes sands, shells, gravel and possibly materials of other names.[1] "Minerals" relates to oil, gas, sulphur, salt and numerous other substances within that genus. "Other things" is all-inclusive—it can mean oysters on the bed, sponges, shells and more commercial substances too numerous to mention and the existence of some of which might now be unknown. While the Complaint probably was not intended to include the waters themselves, or the free-swimming fish in them, the omnibus language might be extended that far, if reduced to a decree.

And, it should ever be remembered that Article V of the Complaint chides Louisiana for having negotiated leases with various persons and corporations and for having received substantial sums of money from them. It charges that these persons have entered upon the property and drilled wells for the recovery of petroleum and other hydrocarbons. It is alleged that wells have been producing quantities of oil and the lessees have converted it to their own use, paying the State substantial amounts in rentals and royalties, but that no one has accounted to the United States for the value of these products. In VII, it is said that the granting of these leases and the taking and using of these minerals "and other things of value in the area" are in violation of the **rights** of the United States.

[1] "The term 'land' includes, not only the ground or soil, but everything which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hand of man, as houses and other buildings; and it has an indefinite extent upwards as well as downwards, so as to include everything terrestrial under or over it". Co. Litt. 4a.

Not only do these references to the pleadings throw light on what is actually sought by Plaintiff in this case, more familiarity with the things that are being done by Louisiana and its lessees will further reveal how tenuous is the tie between the proprietary rights which are being claimed and the fundamental rules of international law which have been offered for the appropriation of those rights in favor of the United States. The Appendix contains discussions of factual conditions and some technical activities which this Court can notice without proof;[2] and it is attached for background which apparently was not considered in reaching the decree in *United States v. California.*

The business of searching for and producing oil and gas in the United States has become so widespread and so much a part of everyday life that anyone interested in the subject can learn how it works in a well-stocked public library. But those, like the members of this Court, whose relations are not close to these affairs are apt to assume the existence of facts, as some press writers do, indicating that the whole of the property involved here is a great reserve of oil resources ready for use, to be held intact for future wars or future generations. But nothing could be further from the truth than assumptions or claims along that line. Those who have familiarity with the business know that the search for underground conditions (whether under the sea or under upland areas) which produce oil or gas is a hazardous undertaking. As the Appendix points out, even preliminary investigations require the employment of numerous techniques through those skilled in different sciences, and these first explorations only record

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[2] *Werk v. Parker*, 249 U.S. 130; *Atchison, T. & S. F. Ry. Co. v. United States*, 284 U.S. 248.

indications or the failure of indications of a possible source of supply. It appears that when favorable underground structural conditions have been indicated, difficult and tedious drilling operations must be carried on which may or may not result in the discovery of an oil or gas pool. Oil and gas are resources that must be located in underground traps before they have any practical existence; and the chances of finding them, because of the many surrounding difficulties and uncertainties, are highly speculative. While there are large areas which, because of geographic location, offer the chance of providing other deposits, very little oil, comparatively, has been found under the Gulf of Mexico.* And the assumption that they exist does not give them commercial or governmental or international value or importance. They can not be made known unless and until through private search the source beds are identified, are found to be productive, are located in areas allowing the drilling of wells, and prove to contain sufficient oil to make the venture commercially profitable. Now, the discovery of gas away from shore, far from being a profitable venture, is one of disappointment as gas can not be stored but must reach its market through pipe lines and these locations of gas fields in this era leave them without present commercial worth. The Appendix also reveals that in the Gulf coast area the underground structures are formed by upthrust salt plugs or cores. If they are found to be near enough to the surface and if other conditions allow, the salt itself may be susceptible to being mined on a commercial scale, either by the sinking of shafts or by pipes using a dissolving process. In rare cases these salt cores are overlain with sulphur

* The daily production of oil in the United States is approximately 5,000,000 barrels; about 5,000 barrels (1/10th of 1%) come from the Gulf area.

deposits that might be operated commercially even under water areas if other conditions are fit. But these minerals are also useless unless and until someone has found them to exist and that they can be mined by customary methods.

While there are also many other resources on and under the bottom of the Gulf and over which Louisiana has exercised proprietary rights, one example will serve to dispel the illusory State-Federal conflict which has been assumed to be within the realm of international responsibilities and law. Widespread areas off the outer shores of Louisiana are covered with reefs, sometimes extending to considerable depths, of oyster shells formed during some geologic periods by the continuing birth and death of generations of the mollusk family. They are part of the bed of the sea and underlie the Gulf of Mexico. Were proof allowed, it would disclose that millions of yards or tons of these shells are available for industrial use. The State of Louisiana has granted licenses to dredge them from the bed; and manufacturing plants have been established on the faith of those contracts to use this natural resource for its lime (about 90% content. The search for such deposits is not fraught with the uncertainties that confront one looking for oil; but, except in degree, the location of these shell deposits, the removal of the resource and its use in domestic affairs, are no different from the search for and production of oil.

Now, the thing that Plaintiff seeks is to deny the State by injunction, and to claim for itself, is the right in the Gulf to search for and extract minerals and **other things of value,** not mentioned by name. And, while *United States v. California* considered the problem

to be of international scope, there is no allegation in the present petition that Defendant, by leases or otherwise, has intruded within any of the external relations or affairs of the United States or interfered with any of its responsibilities to make war or to keep the peace. To the contrary, it should be noted that oil and other operations in the Gulf are now and always have been conducted subject to the paramount sovereign and constitutional powers of the United States. As an example, evidence would show that each drilling operation on what is a relatively small point in the Gulf always has been and now must be with the sanction and approval of the War Department and its Engineers, and oil production, as well as anything else that is done incidental to it, needs be, as it has been in the past, under their supervision and control.[1] There the federal government has performed and performs its responsibilities so that there could be no interference with commerce interstate and foreign and that nothing will be done to hamper the use of the waters of the Gulf for the protection of the shores of this Nation. But no part of this suit indicates or suggests that Louisiana has disputed that authority.

Now, if wars come, whatever operations are being conducted in the Gulf of Mexico, through State leases, would continue or no according to the demands and needs of the United States. The oil then being produced would be subject to first call in aid of "the common defense" along with oil produced from private lands. Indeed, federal claim to these resources began in 1937, long after Louisiana asserted its rights, and has been discussed and urged in the press and through Congressional committees and since then a great war has been fought

[1] *U.S.C.A. Title 33, Section 403* requires such authority for structures in any navigable waters of the United States; but the law does not pretend to thereby give proprietary rights to the United States.

and won. Oil played an important part in that conflict; but the exercise by the State of rights to the resources in the Gulf, the operations in that sea, did not impede the waging of the fight nor interfere with the Government's international compacts or its international responsibilities.

It is true, of course, that "the supreme will" in external sovereign affairs must be in the Nation. It can be conceded that the federal government's external powers, its sovereign international duties and rights, are not limited to the enumerations in the Constitution (*United States v. Curtiss-Wright Corp.*, 299 U.S. 304). But it is also true that any extended sovereign responsibilities in that sphere could only concern "the powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties" (p. 318) and other necessary concomitants of nationality in the external field of relations between the federal government and foreign states.

And, if Louisiana were here denying the paramount governmental rights and responsibilities of the United States and if it were claiming them for itself, then this Court could properly repeat the language used in *United States v. California* (pp. 35, 36) that "the State is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks". But, Louisiana does not claim **paramount** rights or powers in the marginal sea any more than it claims them in the Mississippi River or Lake Pontchartrain. For it admits that its rights and its proprietorship always are subject to the Constitutional paramount rights and powers of the United States and to its duties to

protect the Nation in the event of war. And, there is no allegation to the contrary in the Complaint. On the other hand, Louisiana is equipped, indeed it is better equipped than the United States, to exercise and regulate the proprietary rights to search for and to produce minerals and other things of value in State territorial waters.[1] And these rights and powers of the State are no different one mile, say, off shore than they are in its waters that are inland. Nor are the paramount rights, powers and duties of the United States any different in one direction than in the other.

While the oil, if and when it is produced, could possibly "become the subject of international dispute and settlement", that fear of the future does not give proprietorship in the oil that now might be underground or over the right to find it. And, can that fear, by any legal concept, give the Federal Government a proprietary interest in the many other heterogeneous substances within the purview of the prayer of the Complaint? Can the "very gas" that might underlie the Gulf belong to the United States because of some assumed future possibilities? Can the fear be attached to sand, or to salt, or to oysters or to oyster shells? Do these things arouse possible future difficulties or dangers to the security and tranquillity of the people of the

[1] The House Judiciary Committee (1948) after extensive hearings, reported:

> "None of the Federal Government's representatives had any criticisms to offer concerning either the management by the States of their submerged lands or the conservation regulations imposed upon the oil industry generally by the States . . . the committee believes that it would not be in the public interest for this Congress to destroy the highly developed, experienced, and efficient State organizations now controlling the submerged oil deposits by transferring such resources to a Federal bureau which has no facilities, no intimate knowledge of the complex local problems, and no laws or established rules or practices under which operations can be carried on." (H. Rep. 1778 on H.R. 5992, 80th Cong. 2d Sess. (1948) 19-20.)"

United States and its relations with other nations; and does that fear create proprietorship in the federal government? Or, is proprietorship claimed by the United States by the right of conquest? Here there is no suit and no dispute between anyone except the United States and Louisiana as a member of the Union. To resolve the so-called "State-Federal conflict" by the powers of the United States in external affairs, when the claim relates to resources of value, would nullify the compact between the individual states. For it would violate the rights of Louisiana as a State and reduce it to the status of a foreign, nay an enemy, nation.

But the paramount powers and responsibilities of the United States are the other way. And, while the ethereal support of its responsibilities is offered by Plaintiff, and that is all that Plaintiff offers, for the rights "which it seeks", the responsibilities were undertaken by the Constitution without pay:

> "The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion . . ." Article IV, Section 4.

No authority has been offered to support Plaintiff's proprietary claim when urged as an incident to such governmental function and responsibility, and certainly none can be found in its favor.

Cases like *Jones v. United States*, 137 U.S. 202, and *In re Cooper*, 143 U.S. 472, cited in *United States v. California*, do more to uphold the arguments later made in this brief on the necessity for Congressional action than they do for Plaintiff in attempting to attach a proprietary interest to a sovereign responsibility. *Jones v. United States* only confirmed the rule that Congress

may extend jurisdiction of the United States over Guano Islands, discovered by private citizens; but proprietary rights of the private discoveries were protected and not given to the United States. *In re Cooper* was concerned with congressional legislation about fur seals in Alaskan waters—territorial only to the United States. Nor does the decision in *United States v. Belmont*, 301 U.S. 324, also mentioned in *United States v. California*, give comfort to a claim of internal proprietorship as an incident to external sovereignty. For that decision is only one among many authorities for the rule that sovereign power over external affairs is exclusively in the national government.

Louisiana repeats that it has no complaint about the pronouncements in *United States v. California* that federal authority, in international affairs, is exclusive and supreme. Louisiana ever admits that its property rights in the Gulf, like its rights in the Mississippi, must be subservient to federal paramount powers. But the challenge is to the relief prayed for—to the decree sought here—which would attach proprietorship to those powers and take it from the State. For the decree here projected by the present prayer involves many resources and the right to search for them and the funds already paid to the State therefor; things that do not suggest an external problem or international implications, but only internal and domestic concern.

And no strange avenues of the law need be explored for support of that idea. *Skiriotes v. Florida*, 313 U.S. 69, 72-73, approved in *United States v. California*, recognized that Florida had control in the marginal sea "with respect to matters in which the State has a legitimate interest" and that sponge fishery in waters of the Gulf

only concerns "domestic rights and duties". The same principle is found in *The Abby Dodge*, 223 U.S. 166, another sponge case, treated more fully further on, and it applies here. There is no legal distinction between sponges and the resources in this suit, except perhaps in degree, a thought also made more certain by discussions in earlier and later parts of this brief. In truth, sponges necessarily are within the present claim to "other things" of value. And, thus, Plaintiff's chief error is in confounding governmental paramount rights and powers in the external realm with the use of the bed of the marginal sea for the production and conservation of valuable resources, well within the internal fiscal scheme. So the relief which the United States seeks, the use and value of these domestic goods, must depend upon title or some other superior proprietary right. And federal title is definitely absent from the scene.

Whether it is necessary that assumed power be exercised by Congress is not within the grasp of this chapter, being the subject of later argument in part (c). But, without fee simple title in the United States, the Complaint must offer, or the decision in *United States v. California* must reveal, some constitutional power giving proprietary rights and interests in the minerals and other things of value under the Gulf, superior to the rights of the State, before necessity arises for the Court to pursue the inquiry further.

"The broad statement that the Federal Government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers", see *United States v. Curtiss-Wright*

Corp., supra, (pp. 315-316) is categorically true "in respect of our internal affairs".

Carter v. Carter Coal Co., 298 U.S. 238, 296, confirms:

> "**And the Constitution itself is in every real sense a law**—the lawmakers being the people themselves, in whom under our system all political power and sovereignty primarily resides, and through whom such power and sovereignty primarily speaks. **It is by that law, and not otherwise, that the legislative, executive and judicial agencies which it created exercise such political authority as they have been permitted to possess.**" (Emphasis added.)

And, it was recognized in that decision, no matter what purposes are in view, there is nothing that can "serve in lieu of constitutional power".

What can be found in the enumerations of the Constitution to give Plaintiff relief?

Under Article I, Section 8 of the Constitution, Congress has power "to declare war" and to provide for "the common defense", which are those powers bearing upon international relations to which Louisiana is always subservient and to which all its properties and rights might be subjected if and when the necessities arise. Congress's power "to regulate commerce with foreign nations and among the several states" . . . "to exercise like authority over all places purchased by the consent of the Legislature of the state in which the same shall be" for the erection of certain needful buildings and to "make all laws which shall be necessary and proper" for carrying into execution the numerous other powers set forth in Section 8 of Article I of the Con-

stitution are really inclusive of many responsibilities and Louisiana concedes that they are paramount to its rights. But Plaintiff has been unable to offer legal authority to say that such abstract ideas could give proprietorship or take it away.

On the other hand, *Toomer v. Witsell*, 334 U.S. 385, decided after *United States v. California*, clarified that earlier decision. And, this Court then recognized the "importance to its people that a state have power to preserve and regulate the exploitation of an important resource"; pointing out that, ownership aside, *United States v. California*

> "does not preclude all State regulation of activity in the marginal sea". (p. 402).

Toomer v. Witsell really did more. In effect it so explained the decision in *United States v. California* as to make it without force so far as Plaintiff is here concerned. It was said that Appellants "urge that South Carolina has no jurisdiction over coastal waters beyond the low-water mark". And, in the lower Court they had relied for that contention on the decision in *United States v. California*. But this Court said (p. 393):

> "Here Appellants seem to concede, **and correctly so,** that such is neither the holding nor the implication of that case." (Emphasis added).

The right of South Carolina to the control of shrimp in its territorial waters (called "marginal sea") was upheld without regard to ownership (p. 402):

> "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate

the exploitation of an important resource."

And the State's rights in all things in its territorial waters were recognized by that decision and emphasized by the concurring opinion of Mr. Justice Frankfurter and Mr. Justice Jackson (p. 408):

> "A state may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers."

Manchester v. Massachusetts, 139 U.S. 240, in its refutation of "rights" here claimed by Plaintiff, is clear and binding on this Court:

> "The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and, except so far as any right of control over this territory has been granted to the United States, this control remains with the State." (p. 264).

And, *New Orleans v. United States*, *supra*, also fits here:

> "All powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the states and the people."

The Abby Dodge, 223 U.S. 166, also denies rights here claimed by the United States so far as they are proprietary in nature. And the case is important to the First Defense which postulates that there is no fee simple title in the Federal Government and denies that Federal paramount rights and powers include a proprietary interest in the resources in and under the bed of the Gulf.

The Abby Dodge was discussed in *United States v. California*, but the Court there considered it as being only "concerned with the state's power to regulate and **conserve** within its territorial waters" and that it had no relation to the right of the State to "use and **deplete** resources which might be of national and international importance". (pp. 37-38) (Emphasis added). *The Abby Dodge* may have dealt with regulation in its narrow sense, but it still denied the United States power to authorize the taking or gathering of sponges from land under water "within State territorial limits", which necessarily denied proprietorship in the United States.

While the California decision was limited to oil and based on its importance, and while Plaintiff would limit this case in a similar way, there was then and there are now involved many resources in different degrees of importance and concern. And the tenuous distinction between conservation of sponges in the Florida case and the assumed depletion of a resource by California or this State, does not detract from the force of *The Abby Dodge* in determining the merits of the First Defense.

Sponges are a low form of animal life which attach themselves to rocks in the sea. Oil results from the decomposition of low grade organic matter during a geologic age. It merely occurs under the bed of the sea like under the surface of landed areas. Search must be made for either resource; the difference in methods is not legal, but controlled by practical and physical considerations. The proprietorship must be based on the same kind of claim; and, except for its assumed greater worth, oil is no more an element of national sovereignty than are sponges or other resources of value above or below the ground.

Now, the search for and production of oil and gas is not to use and deplete them against national or international interests, as was suggested in *United States v. California*, but is actual conservation because it brings into being something that otherwise would never be of use to any one. The finding of underground sources of oil and gas and the development of those discovered are as much within the field of conservation as is the use of legalized equipment in the sponge traffic. And, the so-called oil reserve under the Gulf of Mexico are mostly imaginary. Like sponges off Florida, to be useful they must be found. Without private leases, without private license, without private technical knowledge and skill, many possible sources of oil under the bed of the sea would never exist for any practical good because they never would be known. Unless and until the source beds are located and drilling proves successful, they are a total loss to the State and Nation; and to develop them for the good of the two sovereigns is true conservation.

"Conservation", when used in its larger sense, includes "the saving from loss, as distinguished from the more limited meaning of holding the content in the ground": *United States v. Mammoth Oil Co.*, 5 Fed. (2d) 330, 351. (See also "Conservation of Oil and Gas, a Legal History, 1948", published by Section Mineral Law, American Bar Association).

The discovery of underground sources and the production of oil, saving it from loss, carried on under usual State regulations, meet every element of effective "conservation". And "depletion" is not its antithesis. It is the inexorable result—perhaps in the far distant future—when individual pools will become exhausted whether operations be under Federal or State ownership

and control. But new or additional source beds for oil will be located, like sponges will continue to be found. After discovery, after it has been brought into useful being by production, and before exhaustion of any particular source of supply, the oil from that pool will be as available to the Nation when produced under State lease as it could be under one by a Federal agency.

Thus, there is no real distinction between *The Abby Dodge*, **with its denial of Federal right,** and this suit, by which Plaintiff seeks not only control but ownership of oil, gas and **all other resources** on and under the bed of the Gulf of Mexico. And, in its true light, with the title question aloof, *The Abby Dodge* should be accepted in Defendant's favor, refusing Plaintiff's claim. For, while it deals with sponges only, it actually reaches lands, minerals and "other things of value" in the Gulf and denies Plaintiff proprietary rights.

Now, a great part of the opinion in *United States v. California* was consumed with California's Defense and little attention was given to Plaintiff's positive claims. But the Court's treatment of *The Abby Dodge* and of the Pollard * rule at this phase of the case, when State title is not concerned, does not supply Plaintiff's needs. For, in order that Plaintiff have its prayer, it would be required to affirmatively prove that because of its governmental paramount rights, dominion and power, it has and could exercise, to the exclusion of the State, proprietorship of the minerals and **all other resources** on and under the bed of the Gulf of Mexico.

As nothing has been submitted to support this idea, the Complaint signally fails to meet that necessity.

* *Pollard's Lessee v. Hagan*, 3 How. 212.

(c)

There has been no exercise by Congress of power and authority over the resources of the Gulf; nor has any law been adopted to authorize their use.

Denying that the United States has title in fee; pretermitting the question of State ownership; but granting, *arguendo*, that there is some dormant Federal power over or right in the minerals and other things of value off Louisiana's coast, narrows the scope of this inquiry to a determination of whether that power has been exercised through constitutional means.

United States v. California spoke of "governmental powers to authorize" the use of the territory described. And it was suggested that there were conflicting claims "as to which government, State or Federal, has a superior right to take or authorize the taking of the vast quantities of oil and gas underneath" the land (p. 25). But let it again be remarked that this suit involves more than oil and gas; it includes many other things of value on and under, and perhaps above, the bed of the Gulf.

A reading of the California case strikes one forcefully that this Court there assumed, and the contrary does not appear to have been argued, that by a decree for Plaintiff, someone acting for the Federal Government could take up with the things that the State had accomplished through its lessees, and that Federal authorities could immediately act in taking or using or conserving the resources involved as would ordinarily follow a decree in one's favor. And, the same thought would apply here. But the present argument is intended to demonstrate that such assumptions were and would

be unfounded and that, no matter how far the Government's paramount rights and powers could be extended, there has been no exercise of that power in the manner provided by organic law. And, the argument will prove that there is no "conflict" that amounts to a justiciable controversy to be decided by this Court and that there is no basis for granting the relief prayed for in Plaintiff's Complaint.

Before entering that decisive discussion, it is well to pause to analyze that part of the California decision rejecting the defense that the case presented no justiciable controversy. For at first blush, it might suggest some answer for the arguments that have gone before and some of those that follow. But it can be demonstrated readily that the questions brought forth here were given no thought in the California case and were not decided adversely to anyone; and most certainly will it appear that there was no denial there of Louisiana's Defense that the Complaint fails to set forth a claim on which relief could be granted.

When the argument was made by California, there still was a claim on each side to fee simple title to the bed of the Pacific Ocean within the three-mile belt. While the dispute did present a controversy "in the classic legal sense", it was resolved against the Government when its alleged fee simple title was denied. And, the argument here, under the First Defense, irrefutably postulates that Plaintiff's claim to fee simple title is no longer in the case.

California, in dealing with justiciable controversy, sought to classify the dispute as abstract because a lead-

ing government official had expressed doubts "as to the extent of his statutory and constitutional powers" (page 7, California's appendix brief), but Louisiana makes the argument that the admitted paramount rights and powers, to which the State's interests always must bow, need no declaration by this Court. And the argument hereafter made will further demonstrate that there is no federal official having any powers to do the things that the Complaint would deny to Louisiana.

While the California brief did call attention to the failure of Congress to pass any statute "asserting any right or claim over the marginal sea", that was not the full basis of its argument. For it was admitted in California's brief (Appendix, page 5) that "the only thing that prevented" the Secretary from acting "was his own doubts", the inference being that there was some authority in law for him to proceed. California did not urge the point, but it here will appear, and there is nothing against it, that **there is no Congressional authority for any federal official or for any federal lessee to search for and produce minerals or other things of value in and from the Gulf of Mexico.** The point is made, different from the argument by California, that the United States has not exercised any rights, in that it has authorized no one to act, in conflict with the lessees of Louisiana, through the only governmental department—Congress—having authority to exert such power, if authority exists at all. And that is the irresistible force of this chapter (c).

California argued the absence of a case or controversy because it was impossible to locate the limits or boundaries of the area claimed by the United States. Therefore, California concluded, all that was prayed for was a declaration of rights concerning an unidentified

three-mile belt. Had California's argument continued into another abstraction, the decision of this Court probably would have been different. Here, the Complaint deals with oil, but gas, sulphur, salt, sand, shells and innumerable other things, are just as much a part of the case as that important hydrocarbon. The theory propounded by Plaintiff, and on which it depended in *United States v. California*, is that **oil** is so important that its proprietorship must be within the superior or paramount rights of the United States. But how can that argument apply to oil any more than to gas, or to shell, or to sand, or to salt, or to the many unknown or to the undefined substances falling within the limits of "other things of value"? No complaint was made by California that a decree for the **unnamed** resources would be an abstraction without judicial authority.

In the end, California suggested (page 10 of its appendix brief) that there remained "only a debated question of law" in that Federal officials were seeking "an advisory opinion before proceeding to act upon matters pending before them". But that is not the case. The absence of a case follows the lack of conflict between the State and Plaintiff's paramount rights and responsibilities and the failure of Congress to exercise the power, if it exists, to use the rights that Plaintiff demands. The Defense here is not that Federal officials are delaying their actions for an advisory opinion by this Court. **It is that there is no Federal law under which they could act at all. So, in reality, Plaintiff seeks an advisory opinion by judicial declaration of abstract principles to uphold some later possible legislative action by Congress.**

As the question of justiciable controversy was not argued by California nor decided by this Court in the

light of Plaintiff's complete lack of title or with a realization of the factual background for this suit, the decision can not influence a determination of the problem as it is presented here. Too, it is worthy of more attention now for Louisiana's objection goes to greater depths than mere lack of justiciability. It exemplifies the absence of support for a claim on which relief could be granted. **For, a decree, as it is prayed for, would prohibit as unlawful, activities which Congress in the future may or may not attempt to place in that class.**

To return to this argument, it is well to look to the Constitution itself for guidance in resolving the questions that arise:

> "The Congress shall have power . . . to regulate commerce with foreign nations and among the several states . . . to define and punish . . . offenses against the law of nations; to exercise exclusive legislation . . . over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings; and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." Article I, Section 8, Constitution of the United States.
>
> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . ." Article IV, Section 3, Constitution of the United States.

So, Defendant now confidently contends that, even

if it be admitted (but only for argument, because it is always denied) that the United States could exert some proprietary power over the resources sued upon, there is nothing upon which to base a decree unless and until there should be some attempted exercise of dormant authority by the Federal Government through Congress.

> "In the United States, sovereignty resides in the people, who act through the organs established by the Constitution. *Chisholm v. Georgia*, 2 Dall. 419, 471; *Penhallow v. Doane's Administrators*, 3 Dall. 54, 93; *McCulloch v. Maryland*, 4 Wheat. 316, 404, 405; *Yick Wo v. Hopkins*, 118 U.S. 356, 370. The Congress as the instrumentality of sovereignty is endowed with certain powers to be exerted on behalf of the people in the manner and with the effect the Constitution ordains." *Perry v. United States*, 294 U.S. 330, 353.
>
> **"Until the dormant power of the Constitution is awakened and made effective, by appropriate legislation, the reserved power of the States is plenary, and its exercise in good faith can not be made the subject of review by this court."** *Gilman v. Philadelphia*, 3 Wall. 713, 732. (Emphasis added).

The principle is well known and well settled.[6a] Nor can any possible international implications avoid the influence of that timeworn rule. In *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 158, it was applied in a case which involved improvement in a stream forming the international boundary between the United States and Canada:

> "In the absence of a violation of treaty, or

[6a] *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245; *Pound v. Turck*, 95 U.S. 459, *County of Mobile v. Kimball*, 102 U.S. 691, *Cardwell v. Bridge Co.*, 113 U.S. 205; *Huse v. Glover*, 119 U.S. 543; *Sands v. Manistee River Improvement Co.*, 123 U.S. 288; *Lindsay & Phelps Co. v. Mullen*, 176 U.S. 126; *Minnesota Rate Case*, 230 U.S. 352, 403-405; *Economy Light & Power Co. v. United States*, 256 U.S. 113; *Newark v. Central R. Co.*, 267 U.S. 377.

> of conflict with an act of the Congress, there can be no doubt as to the power of the state to establish such an aid to commerce. An undertaking of this character by the state falls within the familiar category of cases in which a state may make reasonable provision for local improvements until its authority is superseded by dominant Federal action."

In *International Bridge Co. v. New York*, 254 U.S. 126, 133, one finds this interesting language:

> "No doubt in the case of an international bridge the action of a State will be scrutinized in order to avoid any possible ground for international complaint, but the mere fact that the bridge was of that nature would not of itself take away the power of the State over its part of the structure if Congress were silent, any more than the fact that it was a passageway for interstate commerce or crossed a navigable stream."

While these decisions really dealt with regulations, the principles are the same when there is no title but merely some assumed right that could be exercised. And, to reach the opinion that oil is of such national and international importance that the central government, rather than the states, should have proprietary control, would be beyond judicial function. For, there has been no change in the rule that the Court has no power to "enter into political considerations on points of national policy", but must exercise its duties within a "more narrow compass" and only "administer the laws as they exist". See *The Apollon*, 9 Wheat. 362, 366.

In *Transportation Co. v. Parkersburg*, 107 U.S. 691, 700, 701, this Court had before it a conflict between State and Federal authorities with regard to a wharf charging alleged extortionate rates said

to effect a duty on tonnage; and international policies were in the case. These comments by the Court in that decision also prove how far afield of judicial function it would be to determine that oil is of sufficient importance to allow some unnamed department of the United States to take over all resources without Congressional Act:

> "Our system of government is of a dual character, State and Federal. The States retain general sovereignty and jurisdiction over all local matters within their limits; but the United States, **through congress,** is invested with supreme and paramount authority in the regulation of commerce with foreign nations and among the several states." (Emphasis added).
>
> * * * * *
>
> "But until congress has acted, the courts of the United States cannot assume control over the subject as a matter of Federal cognizance. It is the Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several States. The courts can never take the initiative on this subject."

Manchester v. Massachusetts, 139 U.S. 240, can not be denied as authority for the argument now made. For the entire decision, in its phases most favorable to the United States, clearly announced the doctrine that there was no power over a resource in the federal authorities which Congress "does not assert by affirmative legislation".

The idea finds support in *United States v. California.* The Court there leaned heavily on *Cunard Steamship Co. v. Mellon,* 262 U.S. 100, *Jones v. United*

States, 137 U.S. 202, and *In re Cooper*, 143 U.S. 472, for the statement that (332 U.S. p. 34):

> "And this assertion of national dominion over the three-mile belt is binding upon this Court."

In the Cunard case, for example, Congress **had asserted** national power over the three-mile belt for the control of intoxicating liquors. But the point now is that there has been no "assertion", except by Louisiana, of authority over the three-mile belt in the Gulf of Mexico, or any other part thereof, looking to the discovery and production of oil or gas or other things of value.

Toomer v. Witsell, supra, assumed that South Carolina had power to regulate shrimp in the "marginal sea" off the shores of that state "at least where the federal government has made no conflicting **assertion of power**" —through Congress. (p. 394) (Emphasis added). And there it was found that the case "evinces no conflict between South Carolina's regulatory scheme and any assertion of federal power" (p. 393), so this Court again agreed that federal power, to be exerted at all, would have to be asserted or exercised through Congress.

Louisiana has exercised its authority over the resources within its territorial limits and there is no question here as to whether its power has been so "exercised" within the confines of generally applicable constitutional limitations. According to Article IV of the Complaint, admitted by all parts of the Answer:

> "In the exercise of the rights claimed by it, the State of Louisiana has, by general law, Act 30 of 1915 (Louisiana Acts, 1915, page 62), as superseded by Act 93 of 1936 (Louisiana Acts, 1936, page 276), as amended, authorized the

> leasing of lands underlying the Gulf of Mexico for the exploitation of petroleum, gas and other mineral deposits in the area herein described."

but there is no allegation of the "exercise of the rights claimed" by the United States. Article V avers that Louisiana has granted mineral leases for wells in the marginal sea and the evidence is that such leasing began more than 20 years ago.[7] For many years State licenses have been authorized for the removal of shell, sand, gravel, and other things from the beds of Louisiana waters, to be issued by the Department of Conservation.[7] Since Act 42 of the Legislature of 1914, licenses have been granted for oyster shells in the Gulf, mentioned in another part of this discussion.

The necessity for "conflicting assertion of power" by Congress before there could be an actual controversy or right to relief by the Complaint, can be emphasized by parenthetical mention of the dilemma which Plaintiff made for itself in its own Motion for Judgment. The Complaint alleges (Article VII) that Defendant is trespassing against the **rights** of the United States when it takes and uses the "minerals and **other things of value** in the area"; and the prayer is for a decree enjoining the State of Louisiana from continuing these alleged acts. (Emphasis added) But the rationale of this Court's opinion in *United States v. California* was only that **oil** was of such international and national importance that the Federal Government should be able to keep it under its control. And, Plaintiff finds difficulty in meeting

[7] See *Gorham v. Mathieson Alkali Works*, 27 So. (2d) 299. Act 42 of 1914 authorized licenses for removal of oyster shells "from any of the shell reefs within the boundaries of this State and located **in** or on the borders of **the Gulf of Mexico** or of any of the bays, lakes, inlets, or waterways connected with or emptying into the said Gulf . . ." Louisiana has exercised similar jurisdiction for many years as evidence would show. Acts 110 of 1892; 121 of 1896; 182 of 1898; 52 of 1904; 178 of 1906; 167 of 1908; 291 of 1908; 127 of 1912.

that test for the **"other things** of value in the area"; and because of that perplexity, it is strange to observe, page 3 of the Statement in support of the Motion studiously avoids reference to those other things and recites only that by the Complaint the United States claims rights with respect **"to the lands and minerals underlying the Gulf of Mexico".** (Emphasis added.) And Plaintiff's brief refers to "other things" only in its statement of "Question Presented" but mentions them no more and fails to offer any argument in support of that claim.

Has Plaintiff abandoned its claim to these other things? If it has, should it not file proper pleadings along that line? But that, of course, might lead Plaintiff into an even more embarrassing situation. If Plaintiff's rights depend upon opinion as to need for a resource, admission along that line would further point up the necessity for Congressional action. Or would Plaintiff have the temerity to then say to this Court that the Attorney General is the arbiter of governmental affairs so that he decides what resource will be claimed and submitted for this Court's sanction? Whether or not, if the importance of oil, say, is to decide the issue, certainly decision is to be made by Congress and not by the Attorney General and this Court. And Congress may decide for oil and against gas; it may hold for shell and against gravel. Or, contrariwise, it may conclude that gas and sand or even sponges are of more international importance, or give more national concern, than oil which is found in such great quantities under landed areas of the country.* An advance abstract declaration by this Court in favor of one and against

*The United States produces about 5,000,000, Louisiana approximately 500,000 barrels per day. Less than 5,000 come from Louisiana coastal waters, and a relatively small amount from other parts of the marginal sea.

another resource would not bind Congress; but if injunctive decree should be given against the State of Louisiana based on such abstractions, Louisiana would be bound to comply conformably to its recognition of the power of the judgments of this Court, an unconscionable result which was not foretold in *United States v. California*.

Although no Congressional action is recorded in the books, this Court, in *United States v. California*, indicated an erroneous belief that there had been some conflicting legislative exercise of power on behalf of the federal government. The *Toomer v. Witsell* (p. 393) discussion of the California decision supports that idea:

> "In the court below *United States v. California*, 332 U.S. 19 (1947), was relied upon for this proposition. Here appellants seem to concede, and correctly so, that such is neither the holding nor the implication of that case; for in deciding that the United States, where it asserted its claim, had paramount rights in the three-mile belt, the Court pointedly quoted and supplied emphasis to a statement in *Skiriotes v. Florida*, 313 U.S. 69, 75 (1941), that 'It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the (state) statute **so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting federal legislation, is within the police power of the State.**'" (Emphasis added.)

The part emphasized here was italicized by the Court in the quotation as it appeared in the California decision; and it clearly demonstrates that this Court then thought the United States had "asserted" its claim or had exercised some rights in the marginal sea by "conflicting federal legislation". The observation that

in deciding that the United States "had paramount rights in the three-mile belt" as it appears in the last quotation "where it asserted its claim" could not have been intended as a pronouncement that power could be derived or created merely by the filing of suit. It must be assumed that this Court used the word "asserted" in its more narrow meaning of governmental exercise of power through Congress rather than the mere averment of allegation by proceedings in Court. For such creative assertion must be by Congress. Support for that proposition is in its mere recital and needs citation of authority no more than does the hornbook rule that this Court is not blessed with creative powers but only with those that are within the juridical field.

And, it is said again, this Court in *United States v. California* obviously assumed, when the issue had not been made, that any existing dormant power of the Constitution had been exercised by Congress. Not only is there no law on the books attempting to exercise federal power over the Gulf in conflict with Louisiana, the lack of Congressional action actually denies federal authority to use the oil or any other resource of that sea and denies a cause of action here.

For, even if some federal or constitutional power over the things of value under the Gulf of Mexico could exist without Congressional legislation, Plaintiff still is without right to relief when there are no "conflicting claims of governmental powers" to authorize the use of the resources in the territory described in the Complaint.

Plaintiff well knew when the California decision was rendered and Plaintiff now knows that there has been no legislation adopted by Congress to authorize any federal agency or license to private parties to search for

and produce oil, or gas, or salt, or sand, or sponges, or any other resource underlying the Gulf of Mexico:

> "An important fact to be noted in respect to these decisions is that in each instance the application being considered was filed under the provisions of the Mineral Leasing Act (41 Stat. 437; 30 U.S.C., sec. 181 ff.) which applies to 'public lands'. However, since the term 'public lands' has been held not to extend to land situated below high water mark (*Barney v. Keokuk*, 94 U.S. 324, 338; *Mann v. Tacoma Land Co.*, 153 U.S. 273, 284; discussed *supra*, pp. 62, 70), there was room for the conclusion that the Department of Interior had no **jurisdiction** over the lands covered by the several applications under the provisions of the Act." (Emphasis added).
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> Brief for the United States in support of Motion for Judgment, *United States of America v. State of California*, pages 194-195.

Then, after the decision in *United States v. California*, the Solicitor for the Department of Interior advised the Secretary:

> "You have orally requested my opinion on the question whether the Mineral Leasing Act of February 25, 1920, as amended (41 Stat. 437, 30 U.S.C. 181 *et seq.*), authorizes the issuance of oil and gas leases with respect to the submerged lands below low tide off the coasts of the United States and outside the inland waters of the States. This question arises by reason of the fact that there are awaiting disposition in the Department a number of applications for oil and gas leases in submerged areas of the Pacific Ocean and the Gulf of Mexico below low tide and outside the inland waters of the adjacent States.
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> * * * * *

"Land situated below high water mark has not been regarded heretofore as included in the term 'public lands'. For this reason alone, it may be concluded that the Mineral Leasing Act does not apply to the submerged lands, as they are, of course, below low tide. In fact, in the Government's brief in the *California* case, the Attorney General so argued (p. 195).

* * * * *

"For the reasons indicated above, it is my opinion that the Mineral Leasing Act of February 25, 1920, as amended, does not authorize the issuance of oil and gas leases with respect to the submerged lands below low tide off the coasts of the United States and outside the inland waters of the States."

And the Attorney General, by letter dated August 27, 1947, to the Secretary of the Interior, agreed. There is no law to the contrary.[2] Nor do the statutes reveal

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[2] "After the Supreme Court decision in the *California* case, the question whether the Mineral Leasing Act applied to these areas became material. On August 8 and 28, 1947, the Solicitor of the Department of the Interior and the Attorney General, respectfully, held that the act did not apply to the submerged coastal areas. Accordingly, on September 8, 1947, the Director of the Bureau of Land Management denied the applications pending in that Bureau, and on October 6, 1947, the Secretary of the Interior denied the applications pending in his office.

"There is no reason to think that the legal conclusions of the Solicitor and the Attorney General, and the consequent administrative actions denying all the then pending applications can be successfully challenged in the courts."

(Statement of Solicitor General, page 30, pamphlet "Submerged Lands", Government Printing Office, report of "Hearings before the Committee on Interior and Insular Affairs, U. S. Senate, 81st Congress, 1st Session", bills S. 155, S. 923, S. 1545, S. 1700 and S. 2153).

Oil and gas, (Act of February 25, 1920) secs. 13 and 14, 30 U.S.C. 221-236; oil shale, 30 U.S.C. 241; phosphate, 30 U.S.C. 211-214; sodium, 30 U.S.C. 261-263; potash, 30 U.S.C. 281-287; sulphur, 30 U.S.C. 271-276.

By Act, August 7, 1947, 30 U.S.C. 352, the Secretary of Interior was authorized to lease for oil and other minerals "acquired lands of the United States", to which the mineral leasing laws had

(Continued)

any Federal law relating to "other things of value" in the bed of the Gulf.

When the nature of oil, and of the other resources, is considered, it requires no further discussion to prove that the United States would not and could not take and use them for its own or sell them to others when there is no constitutional or legislative authority to engage in that business. So, Plaintiff's argument here, when title is not in point, is not really over rights in the resources themselves. The question more concerns the right to authorize their use by the granting of leases or licenses to private parties to search for and to produce them upon payment of bonuses, rentals, royalties or some other fixed fee. The Louisiana Legislature, as pointed out before, has authorized such leases or permits for oil and many of the other things found in the marginal sea. But the United States, even by judgment in its favor, would not and could not presume to act under the Louisiana statutes when Congress has passed none giving similar federal authority. As Congress has not acted to provide a means for the exercise of the rights that are involved, the Attorney General could not create it by filing this suit, nor can this Court create it by its judgment or decree. And, therefore, there really is no controversy over the "right" when it has been "asserted" only by one side—Louisiana.

—(Continued)

not been extended; but it was provided: "That nothing in this chapter is intended, or shall be construed, to apply to or in any manner affect any mineral rights, exploration permits, leases or conveyances nor minerals that are or may be in any tidelands; or submerged lands; or in lands underlying the three-mile zone or belt involved in the case of the United States of America against the State of California now pending on application for rehearing in the Supreme Court of the United States; or in lands underlying such three mile zone or belt, or the continental shelf, adjacent or littoral to any part of the land within the jurisdiction of the United States of America". The mineral leasing laws have not been extended to the marginal sea, and Congress positively asserted that its new law should not apply.

And all this leads to a tale of the shocking result that would obtain if judgment should be given on the prayer of the Complaint. For it has been demonstrated that possibly there may be great quantities of minerals and other things of value underlying the Gulf of Mexico but that a relatively small amount has been discovered. It has been brought to light that to build up oil reserves that might eventually be found is a long, difficult and tedious chore. It appears that so far as oil is concerned, it has no value whatever under the ground until sufficient work has been performed to prove it susceptible to successful extraction. And it follows that the future use of this oil can be made certain only by allowing someone, and that customarily through business ventures and private enterprise, to engage in the speculative search with the hope of gain by making the resource available for use. Should judgment be in favor of Plaintiff here; should the operations under State authority be enjoined; and then should Congress disagree with this Court that oil in the marginal sea is a proper subject for federal control or should it never exercise its power, or authorize a use, no one could engage in further explorations. For, Louisiana and her lessees would be forced to desist in their operations and no federal lessee or department could continue, in the absence of Congressional authority. Then, there would be no new oil reserves, for the search would have been shortened too soon. Then, if wars come, a greater part of the oil assumed to be under the bed of the Gulf would be of no use to the State or the Nation because no one would know where it is. For all needful purposes, it would not exist at all. Then, it would be too late to carry on the search during a period of armed conflict. And before and after such wars, not only the oil but all other things of value under the Gulf, if Congress should

not act upon them, would be completely out of commerce.

California's present plight should be proof enough of the force of these observations. The case has never been settled. After the decision, the Attorney General reported to the President the perplexing situation that resulted from the decree. And while he entered into a stipulation with the Attorney General of California, it was without legal support and could not withstand attack if someone with proper interest should question its efficacy.[10] But even these *ultra vires* arrangements, said "to deal with such problems as could not await Congressional and further judicial action", related only to past search and past discovery. New contracts for further investigations, new discoveries of oil pools would have to await Congressional action, which may never come even if it should be admitted that such constitutional authority could exist at all.

A decision here pronouncing paramount rights in the United States, and its dominion over the minerals and other things under the Gulf of Mexico, would not create authority to search for, produce or use the resources involved. Nor could it settle any controversy in advance of action by Congress attempting to exercise such power, nor until some legislative assertion or exercise of power should be brought before this Court for its examination.

For an opinion repeating the *United States v. California* doctrine of paramount rights and powers would be pure abstraction beyond the function of this Court:

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[10] In part, the Attorney General said in letter to the President:

> "The opinion of the Supreme Court last June gave rise to a variety of unusually complex problems. The most pressing of these was the urgent need of assuring continued oil production in the coastal waters off California. Continued oil production was necessary in the interest of the United States . . ."

"The courts deal with concrete legal issues, presented in actual cases, not abstractions." *United States v. Appalachian Electric Power Co.*, 311 U.S. 377.

"The judicial power does not extend to the determination of abstract questions. *Muskrat v. United States*, 219 U.S. 346, 361; *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 74; *Willing v. Chicago Auditorium Ass'n.*, 277 U.S. 274, 289; *Nashville, C: & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 262, 264. It was for this reason that the Court dismissed the bill of the State of New Jersey which sought to obtain a judicial declaration that in certain features the Federal Water Power Act exceeded the authority of the Congress and encroached upon that of the state. *New Jersey v. Sargent*, 269 U.S. 328. For the same reason, the state of New York, in her suit against the state of Illinois, failed in her effort to obtain a decision of abstract questions as to the possible effect of the diversion of water from Lake Michigan upon hypothetical water power developments in the indefinite future. *New York v. Illinois*, 274 U.S. 488. At the last term the Court held, in dismissing the bill of the United States against the State of West Virginia, that general allegations that the State challenged the claim of the United States that the rivers in question were navigable, and asserted a right superior to that of the United States to license their use for power production, raised an issue 'too vague and ill-defined to admit of judicial determination.' *United States v. West Virginia*, 295 U.S. 463, 474. Claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention. *Arizona v. California*, 283 U.S. 423, 462." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 324-325.

And, in the absence of Congressional exercise of

power and control, a judgment against Louisiana following the opinion in *United States v. California* would lead only to **future** conflict. It would not settle any "concrete legal issues, presented in actual cases, not abstractions". *United States v. Appalachian Electric Power Co., supra.* And the threat of such decree should be disposed of by the remarks of this Court in that case that "to predetermine" even in a limited field "the rights of different sovereignties, pregnant with future controversies, is beyond the judicial function".

Now, turning light of the inquiry on a mere right to prosecute this suit, rather than on an unasserted authority in the sea, gives the same answer—the Complaint fails to state a claim on which relief could be granted.

Before examining the problem from that view, let it be said that, of course, if the United States held fee title to lands, an issue which it failed to carry, this brief would not have the temerity to urge that its rights could not be protected by suit against an alleged trespass. For the right to sue in those circumstances has always been recognized, although limited in the same way. In *Cotton v. United States*, 11 How. 229, this Court agreed that the Government, like a private proprietor, can bring suits under local law for trespass on its own lands. But the right was also made to depend on title as it was said that powers as a sovereign should not be confounded with rights "as a body politic". And the rationale of the decision was that when procedure is the result of or based on governmental function, it must be supported by statute:

> "It is true, that, in consequence of the peculiar distribution of the powers of government between the States and the United States, offenses against

the latter, as a sovereign, are those only which are defined by statute." (p. 231).

In *Camfield v. United States*, 167 U.S. 518, it was again recognized that with respect to its own lands, the Government could proceed by ordinary processes for protection against a trespass. But even there legislation was considered necessary to create a right in the government to abate a nuisance by the fencing of alternate tracts of land, by enclosures on other property. There an Act of Congress existed; it authorized suit to remove such interferences with federal lands and even the Act of Congress was in doubt, although upheld:

> "The General government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it can go in the exercise of such power is measured by the exigencies of the particular case." (p. 525).

But those cases are not apposite here when federal title does not exist and when assumed federal power has not been exercised.

With no Act of Congress authorizing the use of the bed of the Gulf for the removal of oil or other resource, with no Act of Congress supporting any basis for the present suit, the issue is brought well within the reach of the opinion of this Court in *United States v. Standard Oil Co.*, 332 U.S. 301, decided on the same day as *United States v. California*. Although the government claim there was based on injury to a soldier, it sought to recover for its monetary loss as part of its fiscal policy, like the Complaint here seeks an accounting for rents and royalties paid to the State. This

Court firmly announced that, except in the cases of absolute title ownership, like *Cotton v. United States* and *Camfield v. United States, supra*, there could be no right of action against assumed fiscal loss unless found in Congressional fiat.

On Plaintiff's behalf, it was argued that as a policy the federal government's executive arm should prevail in situations not covered by traditionally established liabilities. But, said this Court, whatever the merits of the policy might be "its conversion into law is a proper subject for Congressional action, not for any creative power of ours". The opinion recited history of the government's consistent loss through conduct of persons interfering "with federal funds, property and relationship". But (332 U.S. p. 314):

> "Congress, not this Court or the other federal courts, is the custodian of the national purse."

It continued in positive statements to announce that Congress is the "exclusive arbiter of federal fiscal affairs", and that it is the one to secure the government against loss "however inflicted" so as to require reimbursement "as well as filling the treasury itself". A long list of Acts of Congress was cited in support of the observation that "when Congress has thought it necessary to take steps to prevent interference with public funds, property or relations, it has taken steps to that end". And the conclusion was drawn, decisive here when the true character of this litigation is in view, that to establish a new liability through judicial power "would be intruding within a field properly within Congress's control and as to a matter concerning which it has seen fit to take no action".

To give judgment in this suit, on Plaintiff's prayer,

enjoining Louisiana's exercise of rights in the marginal sea and ordering an accounting for monies it has received from its lessees, would violate all the rules recognized and so firmly announced in the last cited decision. For *United States v. California* denied Plaintiff proprietary rights; and they also must be denied here.

While it has been assumed, for the purpose of argument, that there is some dormant federal power or authority to claim an interest in the resources of the Gulf, the silence of Congress denies Plaintiff relief.

So the First Defense denies title in the United States and exemplifies the total lack of any "State-Federal conflict". It points up the abstractions in *United States v. California*, and demonstrates that without some federal legislative authority to do the things which the decree here prayed for would enjoin, there is no actual **conflict** between governmental powers. It reveals that while the prayer of this Complaint is not limited to a declaration of acknowledged paramount powers of the United States as a sovereign, that abstraction is the only thing actually before the Court. In that regard, the Defense is suggestive of the opinion by Mr. Justice Frankfurter, dissenting in *United States v. California*, and some of the foregoing discussions about oil and other resources should add weight to his ideas. For the arguments prove how appropriate to this case are his remarks that to declare that the government has national dominion is merely to say that it is a sovereign and that if the decree means that "it needs no pronouncement by this Court".

In *New Orleans v. United States*, *supra*, the United States, as original plaintiff, had prayed for an injunc-

tion restraining Louisiana officials from "doing any other act which shall invade the rightful dominion of the United States over said land or their possession of it", peculiarly serving as a pattern for the relief Plaintiff seeks in this proceeding. In its final summation and in reaching its decree this Court said (p. 737):

> "It is enough for this court, in deciding the matter before them, to say, that in their opinion, neither the fee of the land in controversy, nor the right to regulate the use, is vested in the federal government; and, consequently, that the decree of the district court must be reversed, and the cause remanded with directions to dismiss the bill."

There can be no remand here. But as "neither the fee of the land in controversy" nor a proprietary right to its use "is vested in the federal government"; as Plaintiff has failed to support an interest beyond its paramount governmental powers; and as there has been no attempt by Congress to exercise power that might be authorized by the Constitution, there can be and there should be dismissal.

And, the First Defense should be upheld to accomplish that end.

SECOND DEFENSE AND THE AFFIRMATIVE DEFENSES

Louisiana has presented the First Defense with full confidence in its merits and with the firm belief that it should end this suit by dismissal. But if the Court can not agree, the title issue then comes into play; and in that event Louisiana insists that it more appropriately should be accorded full trial before a jury in keeping

with the Motion that has been made before. For it has been pointed out that the law, even the mere spirit of fair play, demands that one have his day in court. And particularly is this true when evidence may be disputed and when a decision on facts might control the final judgment.

But, the present Motion for Judgment has forced Defendant to appear with legal answer to the issue of title on the face of the pleadings. So, while Defendant does not agree to that procedure, it confidently accepts the challenge and will meet it by showing title in itself.

The Second Defense categorically answers each Article of the Complaint and puts at issue all of Plaintiff's claims except that it admits that Louisiana's title is subject to the constitutional paramount rights and powers of the United States. But, like the First Defense, it denies that Plaintiff has title to the bed or resources in the Gulf of Mexico because of its constitutional powers or as an attribute of its sovereignty. And with the First Affirmative Defense and Second Affirmative Defense, Defendant's side of the title issue is made complete so far as it is possible without the introduction of evidence on factual issues.

And, contrary to the assumption in Plaintiff's Motion and its brief, *United States v. California* did not decide this case.

While Louisiana does not deny the paramount rights and authority of the United States, it contends throughout that neither do such governmental powers vest proprietorship nor refuse State title. Nor does Louisiana evidence its title or rights by an assumed grant from the United States to the State with the Act of Admis-

sion of 1812; for it is Louisiana's position, supported by sound authority, that the trust title in the Gulf of Mexico, now belonging to the State, was acquired under the Treaty of Cession for the benefit of Louisiana's people and that title to the bed of the sea at no time vested in the United States except in trust for the period required in the formation of the State. For Plaintiff's brief (p. 11-12) is in gross error in assuming that "the Treaty of Cession saved only the title to property which was privately owned", as Plaintiff will learn when it gives consideration to *New Orleans v. United States, supra.*

Louisiana also champions the "equal footing" rule that the original states, as well as all states since formed, as separate, independent, sovereign states acquired title to the bed of the adjoining marginal sea and that the title which they had was never surrendered to the United States; but Louisiana's title rests more in the Treaty of Cession than in the Treaty with the British Crown.

Louisiana also argues that this Court in *United States v. California* did not accord deserved breadth to the Pollard rule, and will so demonstrate, but its claim to title is not dependent upon that rule's effect in the marginal sea. For it could rest its affirmative title and can deny Plaintiff's claim, by another decision of this Court, *New Orleans v. United States*,[1] discussed before, which actually has the force of *res judicata* as between the United States and Louisiana.

That same case was offered to support the postulate for the First Defense denying fee title in the United States. And if the title issue is still to be decided the

[1] *The Mayor, Aldermen and Inhabitants of New Orleans v. The United States*, 10 Pet. 662, 9 L. Ed. 573.

case becomes more important because it not only denies that the United States acquired title to the marginal sea as an attribute of sovereignty, it places that title in Louisiana.

Louisiana's title has always been and is now subject to the paramount governmental rights of the United States. Its ownership is necessarily a qualified one like its title to lands under other navigable waters "such as rivers, harbors, and even tidelands down to the low water mark". *United States v. California*, p. 30. But it is qualified because of the powers of the United States under the Constitution and the responsibilities of the United States as a sovereign for the defense of the nation.

Nor does Louisiana claim the "right to block off the ocean's bottom for private ownership and use in the extraction of its wealth" (pp. 32-33), as was suggested in the California decision. For the argument under the First Defense has demonstrated that the taking of oil from underground, and the extraction of other resources and bounties from the marginal sea, must be in keeping with federal power exercised through the War Department Engineers in accord with the laws of Congress; and that does qualify Louisiana's title. Qualified titles are more the rule than the exception. Since the Constitution of 1921 (Art. IV, Sec. 2), Louisiana has denied its own Legislature right to "alienate, or authorize the alienation of, the fee of the bed of any navigable stream, lake or other body of water", except for purposes of reclamation and except that such beds may be leased "for mineral or other purposes". Even private lands are owned subject to superior governmental powers. They are liable to the rights of eminent domain and proper governmental regulations. In Louisiana, as in

most states, all titles are subservient to public demands under the conservation laws.[1] In this State, the ownership of land on a navigable stream is qualified by the rules giving use of the banks to the public for stated purposes.[2] All ownership of property here is qualified by various legal servitudes and the requirement that one shall so use it that he causes no damage to his neighbor.[3]

But, such qualified ownership does not deny, it includes, the right to draw from the thing owned all the utility it can supply without violating paramount governmental powers within the fields of State, National and International law.

Louisiana alleges title, although it only claims a qualified ownership. And these Defenses are intended to prove that the legal qualified title to the area in suit, with all its attendant rights, is in Louisiana as a sovereign holding it in trust for its people, as it was acquired in the beginning and as it always has been and always shall be.

(1)

Louisiana's title under Treaty of 1803

The territorial and legal histories of Louisiana are found in the report of *New Orleans v. United States*, *supra*, and little further reference to books is required for present purposes. After LaSalle possessed Louisiana in the name of the King of France, charter was granted (1712) by the King to Anthony Crozat, conferring on him exclusive rights for commercial and other purposes over the great extent of country includ-

[1] Act 157 of the Legislature of Louisiana for 1940.
[2] Revised Civil Code, Article 455.
[3] Revised Civil Code, Article 668.
[4] See Martin's History of Louisiana.

ing the territory that now is the State of Louisiana. Title in fee simple was vested in him, and the laws, edicts and ordinances of the realm, and the customs of Paris were extended to the territory. That charter was surrendered to the King and a new one granted in September, 1717 to the Western Company; and the lands, coasts, harbors and islands were granted to this company as they had been to Crozat. In 1732 the charter of the Western Company was also surrendered to the King and a retrocession was made of the "property, lordships and jurisdiction of Louisiana".

After the Western Company surrendered the grant to the King, the French Crown was thus reinvested with its original title and the public domain reunited and so remained until 1769 when the secret Treaty of 1763, by which Louisiana was ceded to Spain, was promulgated and the territories delivered to the Spanish authorities.

The territories remained under Spanish dominion until the Treaty of Retrocession of St. Ildefonso of October 1, 1800, by which Spain ceded Louisiana to the French Republic.

It would be a useless task to again burden this Court with all the "wealth of material" supplied by the briefs in the California case or to repeat the lengthy discussions of the history of rights and powers in and over the marginal sea. Suffice it now to say that while this Court declined to agree with California that prior to the British Treaty of 1783 there has been a recognition of proprietary interest in the sea, it was admitted that long before, "some countries, notably England, Spain, and Portugal, had, from time to time, made sweeping claims to a right of dominion over wide expanses of ocean". 332 U.S. p. 32. The claims of Spain to owner-

ship to part of the sea have been among those termed "extravagant", leading to the "battle of books" which arose in the early part of the Seventeenth Century. Spain even by the Sixteenth Century had claimed exclusive rights in several seas, including "the Gulf of Mexico".[9] Despite any assertions with regard to the fixing of the so-called "three-mile belt", any fair approach to the historical problem gives certainty to the statement that prior to the Treaty of 1783, publicists, and nations as well, had recognized a territorial interest attached to the littoral nation.

Some additions to the material offered before can support not only California's argument but more properly the one here dealing particularly with the claims of France and the Louisiana coast. In "The Answer", Hamilton's Works, Lodge's Ed. VI, 218, one finds the following enlightening paragraph:

> "As to the jurisdiction exercised by the United States over the sea contiguous to its shores, all nations claim and exercise such a jurisdiction, and all writers admit this claim to be well founded; and they have differed in opinion only as to the distance to which it may extend. Let us see whether France has claimed a greater or less extent of dominion over the sea than the United States. Valin, the King's advocate at Rochelle, in his new Commentary on the Marine Laws of France, published first in 1761, and again by approbation in 1776, (Book V, title 1) after mentioning the opinions of the many different writers on public law on this subject, says: 'As far as the distance of two leagues the sea is the dominion of the sovereign of the neighboring coast; and that whether there be soundings there or not. It is proper to observe this method

[9] See Fulton, The Sovereignty of the Sea; Fenn, Origins of the Theory of Territorial Waters; Hall, a Treatise on International Law.

> in favor of States whose coasts are so high that there are no soundings close to the shore, but this does not prevent the extension of the dominion of the sea, **as well in respect to jurisdiction as to fisheries, to a greater distance by particular treaties,** or the rule hereinbefore mentioned, which extends the dominion as far as there are soundings, or as far as the reach of a cannon shot; **which is the rule at present universally acknowledged.'"** (Emphasis added).

And in Wheaton, International Law (Dana's Ed.) Section 179, is a reference to the British legislative jurisdiction extending back to 1736:

> "The British 'hovering act', passed in 1736 (9 Geo. II., cap. 35), assumes for certain revenue purposes, a jurisdiction of four leagues from the coasts, by prohibiting foreign goods to be transshipped within that distance without payment of duties. A similar provision is contained in the revenue laws of the United States, and both these provisions have been declared by judicial authority in each country to be consistent with the law and usage of nations."

The note of Thomas Jefferson, Secretary of State, of November 8, 1793,[7] directed to the British Minister, discussed fully by the Government and California in California's suit, agreed that at that time and for a long time before, territorial rights had extended into the marginal sea; but then, speaking for the United States, it was his opinion that the safer course was to

[7] The note said in part: "Reserving, however, the ultimate extent of this for future deliberation, the President gives instructions to the officers acting under his authority to consider those heretofore given them as restrained for the present to the distance of one sea league or three geographical miles from the seashores. This distance can admit of no opposition, as it is recognized by treaties between some of the powers with whom we are connected in commerce and navigation, and is as little, or less, than is claimed by any of them on their own coasts". A similar note was sent to the French Minister on the same date. Waits Am. State Papers I, 195.

adopt the least distance accepted by publicists and nations of one marine league from shore. And that was before Louisiana's title came by the Treaty of 1803.

Further proof that under the civil law, under the law of France and Spain, as well as the common law of England, ownership of the bed of the sea was attributed to the King, is found in this Court's narration of that legal history in *County of St. Clair v. Lovingston*, 23 Wall. 46. The case involved accumulations or accretions on a navigable water, but some of the law is helpful in this discussion.

A quotation from Blackstone (1765), found in the decision, gives the common law rule as to alluvion on the sea. And he said this:

> "But if the alluvion be sudden or considerable, in this case it belongs to the King; **for, as the King is lord of the sea, and so owner of the soil while it is covered with water,** it is but reasonable he should have the soil when the water has left it dry." (p. 67). (Emphasis added).

And, according to this Court, Blackstone took his definition from Bracton, Judge in the reign of Henry III, who, according to Hale in his De Jure Maris, "says Bracton followed the civil law". (p. 67).

These authorities, added to those which were passively accepted in *United States v. California*, should support the King's title to the marginal sea—the same title that is now in dispute, if there is a dispute between the United States and Louisiana. For there has been no new title created by the discovery of oil. The one with which this case is concerned is the same one that belonged to France and to the King of Spain;

the same title that came through the Treaty of 1803.

By the Treaty of St. Ildefonso (1st October, 1800) it had been agreed between the First Consul of the French Republic and His Catholic Majesty, the King of Spain:

> "His Catholic Majesty promises and engages, on his part, to retrocede to the French Republic, six months after the full and entire execution of the conditions and stipulations herein relative to his Royal Highness the Duke of Parma, the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it; and such as it should be after the treaties subsequently entered into between Spain and other States."

Then, by the Treaty between the French Republic and the United States "concerning the cession of Louisiana" which was signed at Paris, April 30, 1803, the French Republic, claiming "an incontestable title to the domain, and to the possession of the said territory", did "hereby cede to the said United States, in the name of the French Republic, forever and in full sovereignty, the said territory, with all its rights and appurtenances, as fully and in the same manner as they had been acquired by the French Republic in virtue of the above-mentioned treaty concluded with His Catholic Majesty". (Art. I).

By the second Article of the Treaty of Cession there were included "the adjacent islands belonging to Louisiana, all public lots and squares, vacant lands, and all public buildings, fortifications, barracks and other edifices which are not private property".

And then, by the Third Article, it was provided:

> "The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible according to the principles of the Federal Constitution to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."
>
> (See complete copy of Treaty in Appendix).

This (treaty) was the basic title of the United States to "vacant lands" in the territory of Louisiana; it is the basic title of the people of Louisiana, represented by the State, to those other things recognized as being held by the sovereign in trust for the people and for their common good, as decided by this Court in *New Orleans v. United States.*

Article VI, Clause 2 of the United States Constitution provides:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The Treaty of Cession is the "supreme law of the land". And in its enforcement this Court is bound, as it found itself bound in *New Orleans v. United States*, to restrict the proprietary rights of the federal Government to the things which are vested in it by the Cession and to preserve to the State the things that were intended for its people.

New Orleans v. United States did not directly involve title to the sea; but in that case the United States sued the officials of New Orleans, in actuality and without success, sued the State of Louisiana, claiming title to a public quay. And the decision, as suggested before, should prove to the United States that its brief is wholly in error in discussing the Treaty of Cession and the rights of Louisiana resulting from it.

The case was of more importance than this reference to it would indicate. As was observed in the argument by Mr. Livingston, who represented the City along with that leader of the bar, Daniel Webster, it was well for the Attorney General to "call it an important cause", although "happily, importance and difficulty are not synonymous". For, he said, "its importance is far greater than any considerations of pecuniary value could give to it". If, Mr. Livingston further remarked, the case should be "decided in favor of the United States, the decree" would not only give them the land contended for but would cut off from access to navigation other properties, would close their streams, render their wharves useless and, "worse than an invading enemy", would create a blockade; all contrary to the State's right of sovereignty. (p. 689). Here, in more modern circumstances, the importance of the case rests on other grounds. A decision here for the United States would deprive the State of rights and interests, some of which are not even defined, that it has held in trust for its people unquestioned for more than a century, until the magic word "oil" excited the interest of some officials of the Federal Government.

The report, as was the habit in those days, published the arguments on both sides. Mr. Webster, in

his argument, pointed out that the question was not whether New Orleans had the right to use the property, but "it is the question, whether by the treaty of cession, the United States acquired a right to the same, as having had transferred to them the sovereign rights of Spain, and afterwards of France over the territory. This is the right asserted by the petitioner, and put in issue by the answers and pleas". (pp. 672-673). And he argued that the rights and obligation which had to do with "enforcing the uses to which it was appropriated" became vested in the State of Louisiana and did not continue in the United States after the State was formed. Although he was speaking of the public quay, his arguments are fully applicable to the issue that has been raised in this case by the claims of the United States and the Objections by Louisiana.

On the other side, the Attorney General for the United States submitted the argument that title, if not one in fee held by the United States, was held by the Federal Government in trust for all its citizens as an attribute of national sovereignty; **an argument remarkably akin, indeed dramatically like, the one which the Federal Government has offered in this proceeding. But in the New Orleans case, decided more than a hundred years ago, this Court denied the efficacy of that plea.**

The Court stated the issues this way:

> "And the petitioner further stated, that by the treaty of cession of the late province of Louisiana by the French republic of the United States of America, the United States succeeded to all the antecedent rights of France and Spain, as they then were, in and over the said province; the dominion and possession thereof, including all lands which were not private property; and

> that the dominion and possession of the said vacant lands, ever since the discovery and occupation of the said province by France, remain vested in the sovereign; and had not, at any time prior to the date of said treaty, been granted by the sovereign to the city. And the petitioner prayed for an injunction to restrain the city council from selling the land, or doing any other act which shall invade the rightful dominion of the United States over said land, or their possession of it; and a perpetual injunction was prayed." (p. 711).

The Court also acknowledged the case to be one of great importance. It remarked that, from one view, the title worth several millions of dollars depended upon its decision and that, in any aspect in which it might be considered, "principles of the civil law, and the usages and customs of the governments of France and Spain, and also, it is insisted, important principles of the common law, as well as the effect of certain acts of our own government, are involved". (p. 712).

To reach its final conclusions, the Court made an exhaustive study of French and Spanish legal authorities, to determine if the quay had been dedicated for public use, a great deal of the dispute being concerned with that problem, which was resolved in favor of the State.

The nature of the case and arguments also required the Court to closely examine the history of Louisiana relating to a time before the Treaty of Cession, as well as its history after that date and on its admission to the Union under the Federal Constitution. Particular attention was directed to the powers of the King of Spain and the King of France; and the discussions centered on the rights of the public and the people who later organized themselves into the State of Louisiana. And the Court agreed that historically and legally the

quay did not form part of the public lands, either under the governments of France or Spain "which the King could sell and convey", and that while the suit involved land within the very borders of the territory of Louisiana ceded to the United States, it had been reserved for public use, like streets and public roads, the sea and other things held in trust for the people.

In its examination of the French and Spanish legal authorities, the Court by analogy placed the quay in the quality of other things held for the common use of men, which the King could not alien. And with Domat as authority, the Court recognized the civil law as contemplating "two kinds of things destined to the common use of men, and of which everyone has the enjoyment. The first are those which are so by nature; as rivers, **the sea,** and its shores. The second, which derive their character from the destination given them by man; such as streets, highways, churches, market-houses, court-houses, and other public places . . . ".[*] (Emphasis added).

And then the Court, examining the character of the quay, leading to a determination of whether it passed to the United States or to the people of the new State, came to this conclusion:

"From a careful examination of the juris-

[*] "There are two kinds of things destined to the common use of men, and of which every one has the enjoyment. The first are those which are so by nature; as rivers, the sea, and its shores. The second, which derive their character from the destination given them by man; such as streets, highways, churches, market-houses, court-houses, and other public places; and it belongs to those in whom the power of making laws and regulations in such matters as vested, to select and mark out the places which are to serve the public for these different purposes." (Domat, liv. 1, title 8, sec. 1, art. 1). 10 Pet. p. 720.

Las Siete Partidas III, Title XXVIII, Law III (translation by Samuel Parsons Scott, 1931) gives the Spanish law along the same line recognizing the sea and its shores as being different from ordinary lands which could be held in private ownership.

diction exercised over this common by the governments of France and Spain, and the laws which regulated this description of property in both countries, **the conclusion seems not to be authorized, that it was considered as a part of the public domain or crown lands, which the king could sell and convey.** This power was not exercised by the king of France, and the exercise of the power by the Spanish governor in the instances stated was in violation of the laws of Spain, and equally against its usages." (Emphasis added).

"The land, having been dedicated to public use, was withdrawn from commerce; and so long as it continued to be thus used, could not become the property of any individual. So careful was the king of Spain to guard against the alienation of property which had been dedicated to public use, that in a law cited, all such conveyances are declared to be void." (p. 731).

After more lengthly discussions and a consideration of different basic legal principles, this Court posed the important question to reach the denial of the claim by the United States to title to the common ground:

"We come now to inquire whether any interest in the vacant space in contest, passed to the United States under the treaty of cession." (p. 736).

And in answer the Court observed that if the "common" in contest, under the Spanish Crown, had formed a part of the public domain or crown lands which the King had power to alien as other lands, there could be no doubt that it passed under the Treaty to the United States with the right to dispose of it as other public lands. **"But if the king of Spain held the land in trust,** for the use of the city, or only possessed a

limited jurisdiction over it . . . " **the contrary would be true.** (p. 736) (Emphasis added).

And the conclusion was then further drawn that the ground in contest was not within the term of "vacant lands" or property which the King could alien, and, therefore, did not pass to the United States but to the people of Louisiana by the Treaty of 1803; and as appears throughout this entire discussion, the vacant lands or waste and unappropriated lands are those within the public domain which, by Federal laws, have been referred to as "public lands" subject to sale to private parties. And Plaintiff's brief joins in that statement." For Plaintiff argues that such "public lands" do not extend beyond low tide.

And, for that reason if none other, title was not acquired by the United States under the treaty with France.

The Court agreed, in the New Orleans case, that a limited power in the King for certain purposes had been exercised over the ground that was subject to the dispute; the same kind of power that was exercised over the marginal sea. In answering whether that gave the federal government proprietary rights, the Court not only decided that case but its discussions serve as

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* Affirmative argument is made on page 30 of its brief in the *Texas* case and the footnote on page 14 of the brief in this suit says: "We do not find it necessary to contend that Louisiana gave up potential claims to offshore lands by virtue of the 'waste or unappropriated lands' clause of her enabling statute".

"Vacant lands" subject to disposition by the Federal Government have never included tidelands or the soils ~~under tidal waters~~. *Borax, Ltd. v. Los Angeles*, 296 U.S. 10, which, incidentally, held that "the soils under the tide waters within the original States were reserved to them respectively" (p. 15), cites a long list of cases for that conclusion and for the rule: "Specifically the term 'public lands' did not include tidelands . . . the words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws". (p. 17).

authority to deny the claim which the federal government attempts against Louisiana here:

> "The state of Louisiana was admitted into the Union, on the same footing as the original states. Her rights of sovereignty are the same, and by consequence, no jurisdiction of the federal government, either for purposes of police or otherwise, can be exercised over this public ground, which is not common to the United States. It belongs to the local authority to enforce the trust, and prevent what they shall deem a violation of it by the city authorities.

> "All powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the states and the people.

> "It is enough for this court, in deciding the matter before them, to say, that in their opinion, **neither the fee of the land in controversy, nor the right to regulate the use, is vested in the federal government;** and, consequently, that the decree of the District Court must be reversed, and the cause remanded with directions to dismiss the bill." [10] (Emphasis added).

In *New Orleans v. United States*, this Court denied the claim on which the United States sued the State authorities; and it remanded the case to be dismissed; all on a theory that is equally pertinent here because it reserved to the State all sovereignty rights in public property and common things acquired under the Treaty with France and held in trust for the people, except, and only except, the vacant or public lands which passed to the United States which it could sell or convey.

New Orleans v. United States is not an isolated

[10] 10 Pet., p. 737, 9 L. Ed. p. 602.

or forgotten decision, to be looked at askance. It has been cited in numerous cases involving a variety of questions[11] and it also has been followed as authority for defenses like Louisiana makes in this suit. For instance, in *Van Brocklin v. Tennessee*, 117 U.S. 151, the Court had before it the right of a State to tax lands belonging to the Federal Government; and in considering the problem, this Court found it necessary to delve into the sovereignty powers and rights respectively vested in the States and Congress. And in the discussion of the rights of local sovereignty, this Court classed *New Orleans v. United States* along with other familiar cases and ratified the decision insofar as it preserved for the State "the title in lands held in trust" for the people:

> "Upon the admission of a State into the Union, the State doubtless acquires general jurisdiction, civil and criminal, for the preservation of public order, and the protection of persons and property, throughout its limits, except where it has ceded exclusive jurisdiction to the United States. The rights of local sovereignty, including the title in lands held in trust for municipal uses, and in the shores of navigable waters below high-water mark, vest in the State, and not in the United States. *New Orleans v. United States*, 10 Pet. 662, 737; *Pollard v. Hagan*, 3 How. 212; *Goodtitle v. Kibbe*, 9 How. 471; *Doe v. Beebe*, 13 How. 25; *Barney v. Keokuk*, 94 U.S. 324. But public and unoccupied lands, to which the United

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[11] *New Orleans v. Louisiana Construction Co.*, 140 U.S. 654, 662 (1891); *Morris v. United States*, 174 U.S. 196, 246 (1899); *Irwin v. Dixion*, 9 How. 10, 30 (1850); *McDonough's Executors v. Murdoch*, 15 How. 367, 410 (1853); *Schools v. Risley*, 10 Wall. 91, 116 (1869); *Werlein v. New Orleans*, 177 U.S. 390, 399 (1899); *Watkins v. Holman*, 16 Pet. 25, 55 (1842); *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U.S. 672, 684 (1884); *Nebraska v. Iowa*, 143 U.S. 359, 360 (1892); *Best v. Polk*, 18 Wall. 112, 117 (1873); *Rhode Island v. Massachusetts*, 12 Pet. 657, 749 (1838).

> States have acquired title, either by deeds of cession from other States, or by treaty with a foreign country, congress, under the power conferred upon it by the Constitution, 'to dispose of and make all needful rules and regulations respecting the territory or other property of the United States,' has the exclusive right to control and dispose of, as it has with regard to other property of the United States; and no State can interfere with this right, or embarrass its exercise. *United States v. Gratiot*, 14 Pet. 526; *Pollard v. Hagan*, 3 How. 212; *Irvine v. Marshall*, 20 How. 558, 563; *Gibson v. Chouteau*, above cited." (pp. 167-168).

And, in *United States v. Illinois Central*, 154 U.S. 225, *New Orleans v. United States* was recognized as having even greater force. That case involved title to the fee in property on the shore of Lake Michigan, and the bill was dismissed on the defense that there was no legal or equitable claim in the United States to the public ground held for the citizens of Chicago.

According to the Court:

> "It is stated in the information that the United States never parted with the title to the streets, alleys, and public grounds designated and marked on the plat, and that they still own the same in fee simple 'with the rights and privileges, riparian and otherwise, pertaining to such ownership, subject to the use and enjoyment of the same by the public.'" (p. 237).

Supported by *New Orleans v. United States*, the Court decided that "the United States possess no jurisdiction to control or regulate, within a State, the execution of trusts or uses created for the benefit of public or of particular communities or bodies therein". And, this Court agreed that "the jurisdiction in such

cases is with the State, or its subordinate agencies". And *New Orleans v. United States* was given as "an illustration of this doctrine". (p. 239).

The decision in *United States v. Illinois Central*, with great detail, explained *New Orleans v. United States:*

> "In that case the United States filed a bill in the District Court for an injunction to restrain the city of New Orleans from selling a portion of the public quay, or levee, lying on the bank of the Mississippi river in front of the city, or of doing any other act which would invade the rightful dominion of the United States over the land, or their possession of it. The United States acquired title to the land by the French treaty of 1803. By it Louisiana was ceded to the United States, and it was shown that the land had been appropriated to public uses ever since the occupation of the province by France. It was contended that the title to the land, as well as the domain over it during the French and Spanish governments, were vested in the sovereign, and that the United States by the treaty of cession of the province of Louisiana had succeeded to the previous rights of France and Spain. The land and buildings thereon had been used by both governments for various public purposes. The United States had erected a building on it for a custom-house, in which, also, their courts were held.
>
> "It was argued on behalf of the city that the sovereignty of France and Spain over the property, before the cession, existed solely for the purpose of enforcing the uses to which it was appropriated, and that this right and obligation vested in the State of Louisiana, and did not continue in the United States after the State was formed. It was therefore contended that the

> United States could neither take the property, nor dispose of it or enforce the public use to which it had been appropriated. A decree was rendered in the District Court in favor of the United States, and an injunction granted as prayed, but on appeal to the Supreme Court it was reversed, and it was held that the bill could not be maintained by the United States, because they had no interest in the property." (pp. 239-240).

The decision then quoted copiously from the New Orleans case, repeating portions of that opinion which have been quoted before in this brief. Among the paragraphs quoted are these which are worthy of further repetition:

> "'Special provision is made in the Constitution for the cession of jurisdiction from the States over places where the Federal government shall establish forts or other military works. And it is only in these places, or in the territories of the United States, where it can exercise a general jurisdiction.
>
> "'The state of Louisiana was admitted into the Union on the same footing as the original states. Her rights of sovereignty are the same, and, by consequence, no jurisdiction of the federal government, either for purposes of police or otherwise, can be exercised over this public ground, which is not common to the United States. It belongs to the local authority to enforce the trust and prevent what they shall deem a violation of it by the city authorities.
>
> "'All powers which properly appertain to sovereignty, which have not been delegated to the Federal government, belong to the states and the people.'" (p. 241).

And this Court then said that "this doctrine of the Supreme Court in the New Orleans case" was decisive

of the issue there. The claim of the United States in the New Orleans case was to title or some other proprietary right in property held for the common good, like the claim urged here, call it "title" or "ownership" or what you will. **And in that case, as between the parties to this suit, it was particularly and finally settled by this Court that the United States did not acquire, but that Louisiana held, "as an attribute of sovereignty", proprietary rights in things of that class, which include the bed of the sea. And Louisiana, therefore, urges that the "doctrine of the Supreme Court in the New Orleans case" is decisive here and should end this suit in its favor.** (Emphasis added).

(2)

Louisiana's title under the equal footing rule

Louisiana's denial of the claims of the United States and Louisiana's Affirmative Defenses, well supported by the Treaty of Cession and the cases mentioned before, are also in harmony with the long line of authorities supporting title under the "equal footing" clause of the Act of Admission of 1812.

The Treaty of Cession, as noted before, conditioned that "the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States".

By Act of Congress of October 31, 1803, the President of the United States, pursuant to the Treaty of Cession, was authorized to take possession of the territory in order to protect it and the inhabitants "in the

free enjoyment of their liberty, property and religion". And by Act of March 26, 1804, Congress declared that the portion of the territory ceded by France should be constituted as a territory of the United States under the name of the Territory of Orleans; and the residue of the province was to be called the District of Louisiana.

Then, by Act of February 20, 1811, the inhabitants of all that part of the territory ceded under the name of Louisiana by the said treaty made at Paris on April 30, 1803, within the following limits, that is to say:

> "Beginning at the mouth of the river Sabine; thence by a line to be drawn along the middle of the said river, including all islands, to the thirty-second degree of north latitude; thence due north to the northernmost part of the thirty-third degree of north latitude; thence along the said parallel of latitude to the river Mississippi; thence down the said river to the river Iberville; and from thence, along the middle of the said river and Lakes Maurepas and Pontchartrain, to the Gulf of Mexico; thence bounded by the said gulf to the place of beginning, including all islands within three leagues of the coast . . ."

were authorized to form **for themselves** a Constitution and State Government in the manner and under the conditions therein mentioned.

The description, it will be noted, was not a limitation on the sovereignty rights of the State to be formed, but delimited the landed property inhabited by the people of the territory who were authorized to form for themselves, pursuant to the directions of the Treaty of Cession, a State to be admitted into the Union; Section 1 of the Act particularly allowing these inhabitants "to form for themselves a Constitution and State Government".

By Section 3 the people "inhabiting the said territory" were required to agree and declare that they disclaimed right of title to the "waste or unappropriated lands lying within the said territory", **but there was no waiver or disclaimer of any rights of sovereignty title beyond that description.**

And Section 5, after providing mechanics for the adoption and transmission of the State Constitution, declared that "the said State shall be admitted to the Union upon the same footing with the original states".

April 8, 1812 is the date of the Act of Admission. It declared that (Section 1):

> "The said State shall be one, and is hereby declared to be one of the United States of America, and admitted to the Union on an equal footing with the original states, in all respects whatever, by the name and title of the State of Louisiana."

Then, by Act of April 14, 1812, an additional part of the original territory was incorporated into the State "in the same manner, and for all intents and purposes as if it had been included within the original" state boundaries.

By then and pursuant to the Act of February 20, 1811, the representatives of the people of the territory with which it was concerned had adopted a Constitution for the State of Louisiana by which they did "ordain and establish the following Constitution or form of government, and do mutually agree with each other to form ourselves into a free and independent state by the name of the State of Louisiana".

That Constitution, dated January 22, 1812, was approved by Congress by the Act of Admission adopted

April 8, 1812, in which it was ordained that "the said Constitution having been transmitted to Congress and by them being hereby approved", that "the said state shall be one and is hereby declared to be one of the United States of America and **admitted into the union on an equal footing with the original states in all respects whatever** by the name and title of the State of Louisiana". (Emphasis added).

Section 3 of the Act of February 20, 1811 having provided in part that upon the adoption of its Constitution the representatives of Louisiana should "forever disclaim any right or title to the waste or unappropriated land lying within the said territory and that the same shall remain at the sole and entire disposition of the United States", Section 1 of the Act of April 8, 1812 made the approval of the Constitution and admission of the State, subject to "all other the conditions and terms contained in the third section of the Act" of 1811. And the Constitution of Louisiana, like the Act of Admission, gave special reference to the Treaty of 1803.

Not only do these Acts of Congress carry out the purposes of the Treaty of Cession, leaving sovereign powers and title in Louisiana as was decided in *New Orleans v. United States*, the "equal footing" clause of the Act of Admission, so far as rights in the marginal sea are concerned, supports the same title that came to the original colonies by their sovereignty and by the Treaty with Great Britain of 1783.

For, under the "equal footing" clause, and the rule that has been applied by this Court, the same trust title in the bed of the sea was preserved for Louisiana and for its people, in harmony with the idea of title under the Treaty of 1803 which gave them all things

like public places, the rivers and the sea as decided in *New Orleans v. United States.*

The title of Louisiana, like the title of other states, under the "equal footing" clause, is made more definite by an underlying muniment which was not called to this Court's attention and therefore not treated in *United States v. California* and that is the Treaty title which created proprietary rights in the original states and benefiting all those thereafter created and admitted under the "equal footing" rule.

With the success of the Revolution a provisional treaty was made between the original states through the Congress of the Confederation and the British Crown on November 30, 1782; and that provisional treaty was ratified as the definitive one, historically considered as the Treaty between the United States and Great Britain, on April 11, 1783. The original treaty, which was ratified by the final one, contained these important provisions:

> "Article 1st. His Britannic Majesty acknowledges the said United States, viz. New-Hampshire, Massachusetts Bay, Rhode Island and Providence-Plantations, Connecticut, New-York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, to be free, sovereign and independent states; that he treats **with them** as such; and for himself, his heirs and successors, **relinquishes all claims to the government, proprietary and territorial rights of the same, and every part thereof;** and that all disputes which might arise in future on the subject of the boundaries of the said United States may be prevented, it is hereby agreed and declared that the following are and shall be their boundaries, viz:

> "Article 2d. * * * East by a line to be drawn along * * * the rivers that fall into the Atlantic Ocean from those which fall into the river Saint Lawrence; **comprehending all islands within twenty leagues of any part of the shores of the United States. . . .** " (Emphasis added).

So, by the Declaration of Independence and as a result of the Revolution and the Treaty, the original thirteen states as separate, free and independent sovereign states, and named as the recipients thereof, acquired by relinquishment from the British Crown not only all claims to government, but also all **"proprietary and territorial rights of the same".** And by Article II of the Treaty of 1782, the proprietary and territorial rights were made so extensive that by specific reference, the boundaries comprehended **"all islands within twenty leagues of any part of the shores of the United States".** (Emphasis added).

And, as pointed out before, when the Constitution was written by the 1787 Convention of delegates from the original States, they were very careful to require that the blood-bought powers of government and the proprietary and territorial rights of the States, confirmed by the treaty with the British Crown in 1783, be made the supreme law of the land by a specific provision in the United States Constitution, which the people of the original States ratified finally in 1789.

Article VI, Clause 2 of the United States Constitution provides:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; and **all treaties made,** or which shall be made, under the authority of the United States, **shall be the supreme law of the land;** and the judges in every state shall be bound thereby, anything

> in the constitution or laws of any state to the contrary notwithstanding." (Emphasis added).

In this connection, it should be remembered that on Saturday, August 25th, 1787, on motion of Mr. Madison, made in the Convention, Article VIII (later made Article VI by the Committee on Style) was reconsidered and, after the words "all treaties made" were inserted the words "or which shall be made", with the explanatory statement that, "This insertion was meant to obviate all doubt concerning the forces of treaties pre-existing, by making the words 'all treaties made' to refer to them, as the words concerned would refer to future treaties". (69th Congress, 1st Session, House Document No. 298, at p. 618).

So, it is that the 1783 treaty of the Revolution by which the British Crown relinquished to the original states all "proprietary and territorial rights" of the British Crown became, and is now, the supreme law of the land.

And there is no doubt that by this supreme law of the land proprietorship vested in the original states. *Johnson v. McIntosh*, 8 Wheat. 543, 584, so held:

> "By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the 'propriety and territorial rights of the United States', whose boundaries were fixed in the second article. By this treaty the powers of government, **and the right to soil,** which had previously been in Great Britain, **passed definitively to these States.**" (Emphasis added).

The same idea was expressed in *Harcourt v. Gaillard*, 12 Wheat. 523, when this Court said:

> "There was no territory within the United States that was claimed in any other right than that of some one of the confederated States; therefore, there could be no acquisition of territory made by the United States distinct from, or independent of some one of the States." (p. 526).

And until the Constitution was adopted and while the states functioned under the Articles of Confederation, there was a firm protection against the loss of title by the states, unless voluntarily, to the Union; there having been a proviso attached to Article IX which provided that

> "no state shall be deprived of territory for the benefit of the United States".

To repeat citation of the long list of cases brought to the Court's attention in *United States v. California* which support title of the original states and the later ones under the "equal footing" clause to navigable waters including the marginal sea, would be a burden unnecessary to give force to the very words of the Treaty itself, particularly as to Louisiana, when it can so thoroughly rely on the decision in *New Orleans v. United States*. But the same story should be told by quotations from leading cases against which there are none to the contrary.

In *Martin v. Waddell*, reported in 16 Pet. 367, decided in 1842, where the ownership of submerged coastal waters in New Jersey was at issue, the Court held:

> "For when the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them

> for their own common use, subject only to the rights since surrendered by the Constitution to the general government." (p. 410).

The Court then cited approvingly a statement by Lord Hale in his treatise *de Jure Maris*, when speaking of the navigable waters, and the sea on the coasts within the jurisdiction of the British Crown, that the King "is the owner of this great coast". (p. 412). The court further observed that the lands under these waters were held by the King as a public trust for the benefit of the whole community, and that this dominion and propriety was an incident to the regal authority, and was held by him as a prerogative right, associated with the powers of Government; and that when the people of New Jersey took possession of the reins of government, and took into their own hands the power of sovereignty, the prerogatives and regalities which before belonged either to the Crown or the Parliament became immediately and rightfully vested in the **State.**

In *McCready v. Virginia*, 94 U.S. 391, this Court held that,

> "The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. *Pollard's Lessee v. Hagan*, 3 How. 212; *Smith v. Maryland*, 18 How. 74; *Mumford v. Wardwell*, 6 Wall. 436; *Weber v. Harbor Commissioners*, 18 id. 66. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the People in their united sovereignty. *Martin v. Waddell*, 16 Pet. 410. The title thus held is subject to the **paramount right of navigation,** the regulation of which, in respect to foreign and

> inter-state commerce, has been granted to the United States. **There has been, however, no such grant of power over the fisheries.** These remain under the exclusive control of the State . . . The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is in fact, a property right, and not a mere privilege or immunity of citizenship." (pp. 394-395). (Emphasis added).

This principle of title ownership of submerged lands, announced in the earlier cases, has been followed in numerous other decisions which have been brought to this Court's attention before. But the subject should not be developed further without first quoting some effective language in *Mumford v. Wardwell*, 6 Wall. 423:

> "Settled rule of law in this Court is, that the shores of navigable waters and the soils under the same in the original states were not granted by the Constitution to the United States; but were reserved to the several states, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders.
>
> "When the Revolution took place, the people of each State became themselves sovereign, and in that character held the absolute right to all their navigable waters and the soils under them, subject only to the rights since surrendered by the Constitution." (p. 436).

And, this doctrine of proprietary rights also has been applied by specific decisions to almost all the states since admitted into the Union. In 1845, in *Pollard's Lessee v. Hagan*, 3 How. 212, the question arose whether a patent issued by the United States conveyed title to submerged land under navigable waters of Alabama.

There this Court pointed out that it was **"called upon to draw the line that separates the sovereignty and jurisdiction of the government of the union, and the state governments,** over the subject in controversy", (p. 220) (Emphasis added) and that:

> "The right of Alabama and every other new state to exercise all the powers of government, which belong to and may be exercised by the original states of the union, must be admitted, and remain unquestioned, except so far as they are, temporarily, deprived of control over the public lands." (p. 224).

The "public lands" of which the states were temporarily deprived, spoken of in that decision, were the waste and unappropriated lands voluntarily ceded to the United States under the Old Congress of September 6, 1780, to aid in paying the public debt resulting from the war of the Revolution, but under the provision that

> "whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever". (p. 224).

Alabama, said the Court, was entitled to sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia (an original State) possessed it before she ceded it to the United States. For, "to maintain any other doctrine is to deny that Alabama has been admitted into the Union on an equal footing with the original States". Citing *Martin v. Waddell, supra*, the Court continued:

> "Then to Alabama belong the navigable waters, and soils under them, in controversy in

> this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights." (p. 229).

And:

> "By the preceding course of reasoning we have arrived at these general conclusions: First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over this subject as the original States." (p. 230).

Shively v. Bowlby, 152 U.S. 1, is full authority for State title through the same source. A reading of that decision can lead to no conclusion except that the Court there, after reviewing all the cases and all the legal background having anything to do with navigable waters, whether part of the sea or within the banks of a stream, denied the United States proprietary rights which were held to have vested in the states, new and old, by virtue of sovereignty and for the benefit of their people:

> "At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the Colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States."
>
> * * * * *

> **"The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdiction."** (p. 57). (Emphasis added).

This is the "Pollard rule" which, in *United States v. California*, this Court would not accept as supporting the State's title under tide waters extending into the marginal sea; although the Court's refusal in that regard was against arguments unlike those in this suit when it is now contended that the State of Louisiana has title to the bed of the Gulf of Mexico and its resources within its jurisdiction subject to the paramount governmental powers of the United States. **But actually the "Pollard rule" needs no extension into the sea for, historically, it originated there and the earlier progression of the rule was toward and into inland waters affected by the tides.** The "inland water" rule developed from the larger principle and, therefore, needs no **extension** in order to affect the marginal sea.[114]

Indeed, *Pollard-Hagan*, by specific language, itself recognized the rule as applying to the sea. And that, for reasons equally germane to the present times and the present problems (p. 230 with emphasis added):

> "This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen

[114] The Supreme Court said in *Barney v. Keokuk* (94 U.S. 324) that the principles applicable to tidewaters "are equally applicable to all navigable waters". (p. 338).

> the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers. But in the hands of the states this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For, although the territorial limits of Alabama have extended all her sovereign power **into the sea,** it is there, as on the shore, but municipal power, subject to the Constitution of the United States, 'and the laws which shall be made in pursuance thereof' ".

a judicial pronouncement well calculated to demand, now as well as then, that title to the bed of the marginal sea be attributed to the State "if it is to be attributed to sovereignty at all".[12] (Emphasis added).

Additionally, it can confidently be said in the light of the discussions under the First Defense, that there is no sound legal or governmental reason for restricting the so-called Pollard rule to the mouth of a river, like the Mississippi, which flows into the sea. There is no conceivable difference, in necessity for proprietary rights or necessity for governmental control, between an oil well, say, a thousand feet within the mouth of the river, and one a thousand feet beyond where it empties into the Gulf. To limit the Pollard rule as between these two situations, and insofar as it relates to proprietary rights in the resources under the sea, one must find a legal reason for changing the title, or the qualified ownership if you will, from the State to the Federal

[12] See brief of United States in *United States v. California*, page 89.

Government at some particular physical bound. But Plaintiff does not meet that demand by its reliance on International Law when there is no demarcation of external authority, or even internal powers, at such a geographic line. **In truth, the line drawn in *Pollard's Lessee v. Hagan* was not to divide waters into different legal groups but, in the language of the Court, and as pointed out before, the purpose was to "draw the line that separates the sovereignty and jurisdiction of the government of the union, and the state governments, over the subject in controversy".** (p. 220). (Emphasis added).

To further demonstrate how nebulous is Plaintiff's attempted legal distinction between inland and outer waters, and the title to their beds, one need only refer to the case of *Illinois Central R. R. v. Illinois*, 1892, 146 U.S. 387, and some language in that opinion:

> "It is the settled law of this country that, the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. *Pollard's Lessee v. Hagan*, 3 How. 212; *Weber v. Harbor Commissioners*, 18 Wall. 57.
>
> "The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce with different States and for-

> eign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes." (p. 435).
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> * * * * *
>
> "We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations." (pp. 436-437).

The Great Lakes are inland seas. Their international importance is no less than the Gulf of Mexico. They separate littoral States from foreign lands. The difference is that the waters of the Great Lakes are fresh and that the Gulf of Mexico is salty. But the salt content of water could hardly upset a legal principle.

The decisions of this Court dealing with submerged lands have been so well recognized as applying to the marginal sea that the idea, in effect, has been approved by official declaration. Pursuant to Act of Congress of February 20, 1897, the Government Printing Office in 1906 published in eight volumes "A Digest of International Law" edited by Dr. John Bassett Moore. In Volume I, Section 144, pages 701-702, there appears this statement of the law, **in a work authorized by Congress,**

under the heading **"The Marginal Sea"**:

> "By the common law, title to the soil under tide waters, below high-water mark, unless private rights in it have been acquired by grant or prescription, is in the king, subject to the public rights of navigation and fishing. Upon the American revolution, the title to and dominion over tide waters and the lands under them vested in the several States, though certain rights were afterwards surrendered by the Constitution to the United States. The United States, on acquiring territory, whether by cession from one of the States or by treaty with a foreign country, or by discovery and settlement, takes the title and the dominion of lands below high-water mark for the benefit of the whole people, and in trust for the future States to be created out of the territory; although, while holding the country as territory, it possesses all the powers both of national and municipal government, and may grant, for appropriate purposes, titles to or rights in the soil below high-water mark. Congress, however, has not undertaken by general laws to dispose of such lands in the territories, but, unless in case of some international duty or public exigency, has left such waters and lands to the control of the States, respectively, when admitted into the Union."

And decisions of this Court, such as *Shively v. Bowlby*, 152 U.S. 1, and others along that line, were given as authority.

Those cases support Louisiana's claim under the "equal footing" rule regardless of the effect on the Defendant there of the decision and decree in *United States v. California*; for Louisiana has offered more here under that rule and, in addition, has in its favor the decision in *New Orleans v. United States* where title was recognized in Louisiana as an attribute of State sovereignty:

> "All powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the States and the people." 10 Pet. p. 737.

And these arguments close Louisiana's case under its Second Defense and First Affirmative Defense. The Second Affirmative Defense, contrary to Plaintiff's Motion for Judgment (p. 3) does not assert title based on possession adverse to the United States. Neither is the Defense interposed as a plea of acquiescence or estoppel although the nature and extent of possession exercised by Louisiana, were it allowed to give proof, would reflect a long, continued recognition and public conviction of its title and sovereignty rights in the marginal sea. Indeed, none of Louisiana's defenses attempts to wrest title from the United States when it is denied that Plaintiff ever held proprietary rights in the area in suit, except the temporary trust title between the Treaty of Cession of 1803 and the Act of Admission of 1812 when that trust title still held for the people became one of the attributes of State sovereignty. The Second Affirmative Defense, therefore, is cumulative. In view of Plaintiff's Motion, evidence in its support must now be presumed to exist as it has been alleged in the Answer; and it proves that Louisiana has exercised its sovereignty and its proprietary rights and its title, while the United States has claimed nothing beyond its Constitutional powers, over a long period of time; and, except for this suit, Louisiana's rights have been unchallenged and unopposed since it joined the Union in 1812.

CONCLUSION

It was demonstrated by the First Defense that the Complaint does not justify the relief prayed for as a decree could not be issued based only on the abstract

principles that the United States has paramount rights and powers over the Gulf of Mexico. What the decree asks for could come only under title or some other proprietary right.

Not only has Plaintiff failed to offer any evidence of fee simple title, it has failed to point to any constitutional provision, any statute or any decision, or to any rule of International Law, if you will, giving the United States proprietary rights in the area in suit.

And Louisiana contends that as a decree could only follow proof of a right of property, Plaintiff's case must fail; that unless the United States could prove title, it can not be "established" through a judgment of this Court:

> "The article which describes the judicial power of the United States is not intended for the cession of territory or of general jurisdiction." *United States v. Bevans*, 3 Wheat. 336.

On the other side, Louisiana does not argue that the United States, either by the Pollard rule or by some other principle of law, "has lost its paramount rights in the belt" found within the territorial limits of the State. Louisiana has never denied that within the constitutional sphere, the United States has paramount rights and powers over the Gulf of Mexico, like it has over the Mississippi River and other navigable waters leading to the sea. But, to repeat, Louisiana contends that the United States did not originally acquire a title in the resources of the Gulf, except temporarily in trust for the State and its people, and that a decree which would transfer the right to their use and control would be the creation of a new title without constitutional or legal support.

Whether this Court in *United States v. California* was right or wrong in its decree denying California title is not the issue now before the Court. This suit is against Louisiana and involves Louisiana property. And if there is any necessity therefor, it meets the suggestion on page 11 of Plaintiff's brief in that Louisiana can "show special reason for different treatment" in Louisiana's case. That is particularly true in the light of *New Orleans v. United States* which decided the real issue in the State's favor more than a hundred years ago, a case which California failed to cite for the Court's consideration. If the end result must be the same in the two cases, then the remedy is to change the California decree for its benefit, not to deprive Louisiana of its rights because of the California decision.

In *New Orleans v. United States;* land held in trust by the State for the common good, recognized to be so owned under the Treaty of Cession of 1803, was sued upon by the United States, but it was decreed that title for the people had been reserved to the State and could not be taken away by mere judgment of court. This Court then did recognize the power of appropriating property to public purposes as an incident of national sovereignty, adding:

> "And it may be, that by the exercise of this power, under extraordinary emergencies, property which had been dedicated to public use, but the enjoyment of which was principally limited to a local community, might be taken for higher and national purposes, and disposed of on the same principles which subject private property to be taken." (10 Pet. p. 723).

So, if Congress should find it fit to say that, because of "extraordinary emergencies", certain resources of the

Gulf should "be taken for higher and national purposes", then means might be devised to transfer such resources to the Federal government. But Congress first would have to act. Its failure in that regard is one of the forces of the present First Defense. For, in the New Orleans case, this Court agreed:

> "in a government of limited and specified powers like ours, such a power can be exercised only in the mode provided by law". (p. 723).

And, to appropriate property to the national use, the Court continued, **"compensation must be paid"**. (p. 730). (Emphasis added).

For the reasons given throughout this brief, the Motion for Judgment should be refused and the Complaint dismissed; or the decree should deny proprietary rights in the United States and should uphold the claims of Louisiana either on the pleadings or later after full trial before a jury on the merit.

BOLIVAR E. KEMP, JR.,
Attorney General,
State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

L. H. PEREZ,
STAMPS FARRAR,
New Orleans, Louisiana

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.

CULLEN R. LISKOW,
Lake Charles, Louisiana
Of Counsel.

APPENDIX

Memorandum prepared for convenience of Court to show methods of exploring for and producing oil and other minerals in the Gulf of Mexico.

The statements herein made have been prepared under the direction of competent geologists and those familiar with the facts therein set forth; the discussions with regard to the character of mineral deposits being supported by numerous text books dealing with the science of geology and kindred subjects; and the other things being either based on public records or being a matter of common knowledge.

Support for the statements herein made, as well as a more thorough explanation of the operations involved, can be found by reference to the testimony of H. H. Kaveler (page 437) and of E. F. Bullard (page 445) in pamphlet titled "Submerged Lands", published by the Government Printing Office in 1950, being a report of "Hearings before the Committee on Interior and Insular Affairs, United States Senate, Eighty-first Congress, First Session" in connection with bills S. 155, S. 923, S. 1545, S. 1700 and S. 2153; the hearing having been held on October 4, 5, 6, 7, 8 and 10, 1949.

The Origin and Character of Oil and Gas Deposits

Petroleum and natural gas are organic hydrocarbons believed to have been produced over geologic periods from organic matter buried in the sediments of ancient seas now hundreds to thousands of feet below the surface of the earth. The portions of such hydrocarbons available to man have migrated from the source beds through

porous sands or other formations far below the surface of the earth until such migration has been arrested by an underground area or trap of restricted size, usually limited to a few miles in diameter. Such areas or traps are generally called structures and retain the oil and gas which so migrate if such structure contains, in proper juxtaposition, some impervious rock or formation to serve as a seal preventing further migration from that particular location. Such structures or traps are the result of various geologic processes occurring over long geologic periods of time. Under coastal waters of the Gulf of Mexico, as well as the coastal landed area, such forces have been the movement or upthrust of plastic salt plugs or domes thereby changing subsurface location or depths of strata, including porous sands, and bringing such strata or sands closer to the surface; although in such cases the actual surface area, landed or under the sea, usually shows little signs of such upthrusts because of long periods of erosive processes.

The Search for Structures and Possible Oil Fields

The sole business of the modern oil prospector is a search for underground traps. Prior to the invention of geopyhsical methods and improvements now in use, indications of such traps were limited to signs appearing on the surface; and these signs are not found in the sea or water covered areas. There have been important developments in the use of geophysics for the location of these underground structures during the last 27 years, some of the earlier techniques having been abandoned for later processes. Under present geophysical methods employing the generation of sound waves by dynamite explosions underlying domes or structures can

be located and defined with some accuracy, except that all of the work depends on mathematical computations and is subject to the margin of human error. Such structures are sometimes considered to be in one definite area based on seismograph work but later found to exist perhaps several miles away.

There are no differences in the geologic conditions between deposits under the waters of the Gulf and under the Gulf Coast landed area; except that under the water more difficulties are encountered in searching for such structures. Fields like some of those off the coast of California have been found because the structures were first discovered under landed areas and later determined to extend beyond the coast line and under coastal waters.

Several years ago, a campaign of geophysical surveys covered the entire Gulf Coast from Corpus Christi to east of the Mississippi River. The campaign lasted about 6 years and cost some $25,000,000.00 for geophysics alone, the work having been performed by 5 or 6 different companies. This survey on land resulted in doubling the number of domes known on the coast; but each new dome discovered, including those that thereafter produced no oil, cost an average of over $600,000.00 in geophysical work alone.

Because of known factors it is generally assumed that there are many of these structures or domes under the waters of the Gulf of Mexico within the area off the coast of Louisiana, although only a few have been definitely located in the Gulf of Mexico and still fewer have been proved productive of oil. Geophysical explorations have been conducted under permits, such operations consisting of reconnaissance work resulting only

in indications of possible underground structural conditions in given areas. After such geophysical exploration work under permits has shown "suspicious" areas, applications have been made to the State for leases, and, based on competitive bids, the State has received substantial amounts for leases because of information that has been obtained by private work. But more geophysical investigations are then required to definitely locate the supposed trap and to outline it before the commencement of drilling operations. It is believed that the relatively small number of domes found off the coast of Louisiana constitute only a small proportionate part of the number that might be located by future surveys; but a great percentage of all those so located may not produce oil. The geophysical work necessary in the search for oil is an expensive operation. Geophysical work alone in southern Louisiana and during the last 5 years has cost more than $105,000.00 per well for the several hundred exploratory wells, mostly on land, drilled during that period. When taken alone, the work on the sea is more expensive and more uncertain than that on land.

Proof of Structures

After extensive work is performed by such geophysical methods, it is necessary, in order to determine if the underground structure actually exists and whether it is of such quality that it could serve as a reservoir for oil and natural gas, to conduct drilling operations to the depth indicated by the geophysical investigations. Before any such work can be commenced in the Gulf, either a platform must be built for holding drilling equipment at a cost of not less than $500,000.00, or expensive barge equipment must be procured to be used

by submerging such barges at the drilling point for use as a platform; such operations being required because of the water area and hazards of drilling in the Gulf. The actual work of drilling a well requires a great deal of time and before drilling into the structure if one exists, or before proving its non-existence, the costs thereof amount to approximately three times the cost of similar operations on land particularly by reason of storm hazards and other dangers of the sea. During the course of this operation of drilling, various departments or crews are employed; those actually performing the drilling work, those supplying necessary pipe and materials and the transportation thereof, technical advisors, such as geologists, paleontologists and those of like professions.

Such drilling operations under present known methods or techniques can only be carried on in relatively shallow water areas; so that even if geophysical explorations indicate the presence of structural conditions below any particular area, such condition is of no value if the overlying waters are too deep to allow the building of platforms on piling or the use of submerged barges with derricks thereon for the drilling of wells.

That in order to determine whether the geophysical report correctly showed the location of a structure or trap at a given point, the well is drilled by the use of drill pipe to the assumed depth of such structure—anywhere from 3,000 to 15,000 feet—and when the bit, drilled into the surface and handled by the continuous addition of pipe going into the ground, reaches the proposed depth, samples and cores can be obtained by well recognized methods for examination to determine the character of the underlying strata by technical geologic and paleontological studies of the sands and other

rocks. Numerous other scientific methods are used such as electrical surveys made by lowering recording instruments on cable into the hole, requiring the services of specialists and additional technicians. The drilling of a well into such structure might result in determining that it is capable of holding oil and gas and any such well so drilled could possibly result in producing oil and gas therefrom. That in the greater number of cases such wells prove either that the structure is not of such character that oil and gas could be accumulated or it suggests only the possibility thereof, indicating further drilling operations to be carried on for exploratory purposes.

Some of Mr. Bullard's testimony (page 449) more clearly points up these problems:

> "The purpose of all this work is to obtain maps that show probable salt domes, or anomalous areas, which the companies try to lease. The expectation of finding domes is usually justified, but it is not certain. These areas are referred to as anomalies until they have been proved by drilling. Then, we call them structures.
>
> "Through geophysical exploration we hope to find domes. If we do discover them and if we are successful in acquiring leases on the domes, only then can we begin drilling for oil.
>
> "It is estimated that on the blocks now under lease there are 79 structures. From the best information available, 20 of thes are piercement domes, the other 59 are deep-seated or low-relief structures. However, many more structures are known to exist on acreage not yet submitted for bidding.
>
> "How many structures there are within the 100-foot-depth line along the coast of Mississippi,

Louisiana, and Texas is problematical. A reasonable guess is that at least 100 domes, or prospects, are known to the industry, and that possibly 150 to 200 prospects may eventually be found.

"Our exploration is not actually finished until we have found the oil. We can only do this by drilling. Each domes presents a different drilling problem.

"The deep-seated dome is normally broken up into a series of large fault blocks. Some of these blocks carry oil; others are dry. We not only have to drill into the block itself, but into that portion of the block where the oil occurs.

"In the case of piercement domes, the problems are more numerous. The beds are squeezed, tilted at high angles, and locally truncated. In most cases the top of the dome is barren or of little importance; the production is normally on the flank, but it is rarely found all the way around.

"There is no way yet devised to show when you reach the edge of an oil pool. Your next well may be a dry hole. In many cases, the edge well in a rich field may be within a few feet of an old hole drilled by a company that went bankrupt exploring that flank of the dome. The history of piercement domes is replete with examples in which 20 to 50 dry holes have been drilled before production was found."

The history of exploration for oil and gas in the coastal areas has proved that each structure has its own individual characteristics. One may produce from sands on one side while another may produce from sands or accumulations in an entirely different direction from the center of the dome. But even though the underground location of the trap or structure has been fixed

by geophysical means, there is no way to determine the point or points from which oil or gas could be produced except by the drilling of wells.

As was said by E. L. DeGolyer in his article appearing in the magazine "Fortune" of August, 1949:

> "Even a most perfect trap in a most prolific region may be dry. Such a trap within sight of the mammoth East Texas oil field has been drilled repeatedly without success. Even with the benefit of all scientific knowledge available, oil prospecting, no matter how attractive the prospect may be, is still a matter of chance. The drill is the final arbiter."

The salt plugs causing structural conditions above discussed occur in varying widths and extend to depths that have never been determined. There are several such salt domes near the Louisiana coast under private lands which are near enough to the surface to allow the production of salt for commercial purposes. Salt is there mined by shafts. At least one of the domes is producing salt in brine by the sinking of wells and by forcing water into the salt core to dissolve the salt, creating the brine which is then pumped to the surface. It is possible that some of these shallow domes will be found in areas of the open Gulf that could eventually be subject to commercial use.

In some cases the salt plugs are overlain with porous rock with accumulations in the interstices of crystallized sulphur assumed to have been deposited over geologic periods by percolating waters with sulphur content or in some other similar way. Along the landed part of the Louisiana and Texas coast, several salt domes have

been found to contain sulphur near enough to the surface to be mined by what is known as the Frasch process, consisting of the injection of heated water through wells drilled into the overlying rock, the melting of the sulphur and the pumping it in molten form to the surface of the earth. These operations can be carried on with present techniques only at depths to about 1500 feet. It is also possible that some of the domes that will be discovered in the Gulf will contain such sulphur deposits and if the overlying waters are shallow enough and if the domes are close enough to the coast, it may be possible to work them for the production of commercial sulphur. These domes producing salt and sulphur are also sometimes productive of oil in the overlying sands and particularly in the sands creating traps around the periphery of the dome. In at least one case in the coastal area of Louisiana, a salt dome has produced sulphur and is now producing salt by the dissolving process and oil is also being produced from the outer edges of the dome.

The records of operations in the Gulf of Mexico off the coast of Louisiana reveal that 32 structures have been drilled since 1945, but only 6 have produced oil. They show that on the 6 proven structures a total of 26 development wells have been drilled, but only 15 have been producers. Out of the other 26 structural prospects so drilled, 17 of the wells were dry and therefore failed to prove any productive character of the domes. The balance proved the existence only of gas. But in the operations so conducted off Louisiana there has been a total investment of something like $190,000,000, although the gross value of the oil produced has amounted to only about $900,000, or less than one-half of one per cent

of the investment made. Of course, one operator might have profited while another lost; but the over-all picture shows that the search for oil in these areas is highly speculative, is more expensive than operations on land and that oil is still only where you find it.

TREATY BETWEEN THE FRENCH REPUBLIC AND THE UNITED STATES, CONCERNING THE CESSION OF LOUISIANA, SIGNED AT PARIS THE 30TH OF APRIL, 1803

The President of the United States of America, and the First Consul of the French Republic, in the name of the French people, desiring to remove all source of misunderstanding relative to objects of discussion, mentioned in the second and fifth articles of the convention of the 8th Vendemiaire, an 9 (30th of September, 1800), relative to the rights claimed by the United States, in virtue of the treaty concluded at Madrid the 27th of October, 1795, between His Catholic Majesty and the said United States, and willing to strengthen the union and friendship which at the time of the said convention was happily re-established between the two nations, have respectively named their plenipotentiaries; to wit, the President of the United States of America, by and with the advice and consent of the Senate of the said States, Robert R. Livingston, Minister Plenipotentiary of the United States, and James Monroe, Minister Plenipotentiary and Envoy Extraordinary of the said States, near the government of the French Republic; and the First Consul, in the name of the French people, the French citizen Barbé Marbois, Minister of the Public Treasury, who, after having respectively exchanged their full powers, have agreed to the following articles:

Art. 1st. Whereas, by the article the third of the treaty concluded at St. Ildephonso, the 9th Vendemiaire, an 9 (1st October, 1800), between the First Consul of the French Republic and His Catholic Majesty, it was agreed as follows: "His Catholic Majesty promises and engages, on his part, to retrocede to the French Republic, six months after the full and entire execution of the conditions and stipulations herein relative to his Royal Highness the Duke of Parma, the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it; and such as it should be after the treaties subsequently entered into between Spain and other States." And, whereas, in pursuance of the treaty, and particularly of the third article, the French Republic has an incontestable title to the domain, and to the possession of the said territory: The First Consul of the French Republic, desiring to give to the United States a strong proof of his friendship, doth hereby cede to the said United States, in the name of the French Republic, for ever and in full sovereignty, the said territory, with all its rights and appurtenances, as fully and in the same manner as they had been acquired by the French Republic in virtue of the above-mentioned treaty concluded with His Catholic Majesty.

Art. 2d. In the cession made by the preceding article are included the adjacent islands belonging to Louisiana, all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private property. The archives, papers, and documents, relative to the domain and sovereignty of Louisiana and its dependencies, will be left in the possession of the Commissaries of the United States, and copies will be afterwards given in due form to the

magistrates and municipal officers of such of the said papers and documents as may be necessary to them.

Art. 3d. The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.

Art. 4th. There shall be sent by the government of France a Commissary to Louisiana, to the end that he do every act necessary, as well to receive from the officers of His Catholic Majesty the said country and its dependencies, in the name of the French Republic, if it has not been already done, as to transmit it in the name of the French Republic to the Commissary or agent of the United States.

Art. 5th. Immediately after the ratification of the present treaty by the President of the United States, and in case that of the First Consul shall have been previously obtained, the Commissary of the French Republic shall remit all the military posts of New Orleans and other parts of the ceded territory, to the Commissary or Commissaries named by the President to take possession; the troops, whether of France or Spain, who may be there, shall cease to occupy any military post from the time of taking possession, and shall be embarked as soon as possible, in the course of three months after the ratification of this treaty.

Art. 6th. The United States promise to execute such treaties and articles as may have been agreed be-

tween Spain and the tribes and nations of Indians, until, by mutual consent of the United States and the said tribes or nations, other suitable articles shall have been agreed upon.

Art. 7th. As it is reciprocally advantageous to the commerce of France and the United States to encourage the communication of both nations for a limited time in the country ceded by the present treaty, until general arrangements relative to the commerce of both nations may be agreed on, it has been agreed between the contracting parties, that the French ships coming directly from France or any of her colonies, loaded only with the produce or manufactures of France or her said colonies; and the ships of Spain coming directly from Spain or any of her colonies, loaded only with the produce or manufactures of Spain or her colonies, shall be admitted during the space of twelve years in the ports of New Orleans, and in all other legal ports of entry within the ceded territory, in the same manner as the ships of the United States coming directly from France or Spain or any of their colonies, without being subject to any other or greater duty on merchandise, or other or greater tonnage than those paid by the citizens of the United States.

During the space of time above-mentioned, no other nation shall have a right to the same privileges in the ports of the ceded territory: the twelve years shall commence three months after the exchange of ratifications, if it shall take place in France, or three months after it shall have been notified at Paris to the French govment, if it shall take place in the United States: it is, however, well understood that the object of the above article is to favor the manufactures, commerce, freight,

and navigation of France and of Spain, so far as relates to the importations that the French and Spanish shall make into the said ports of the United States, without in any sort affecting the regulations that the United States may make concerning the exportation of the produce and merchandise of the United States, or any right they may have to make such regulations.

Art. 8th. In future, and for ever after the expiration of the twelve years, the ships of France shall be treated upon the footing of the most favored nations in the ports above-mentioned.

Art. 9th. The particular convention signed this day by the respective Ministers, having for its object to provide for the payment of debts due to the citizens of the United States by the French Republic, prior to the 30th of September, 1800 (8th Vendemiaire, an 9), is approved, and to have its execution in the same manner as if it had been inserted in the present treaty; and it shall be ratified in the same form, and in the same time, so that the one shall not be ratified distinct from the other.

Another particular convention, signed at the same date as the present treaty, relative to the definitive rule between the contracting parties, is in the like manner approved, and will be ratified in the same form, and in the same time, and jointly.

Art. 10th. The present treaty shall be ratified in good and due form, and the ratifications shall be exchanged in the space of six months after the date of the signature by the Ministers Plenipotentiary, or sooner if possible.

In faith whereof, the respective Plenipotentiaries

have signed these articles in the French and English languages; declaring, nevertheless, that the present treaty was originally agreed to in the French language; and have thereunto put their seals.

Done at Paris, the tenth day of Floreal, in the eleventh year of the French Republic, and the 30th of April, 1803.

ROBERT R. LIVINGSTON,
JAMES MONROE,
BARBÉ MARBOIS.

Office-Supreme Court, U. S.
FILED
OCT 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 12, Original.

UNITED STATES OF AMERICA, *Plaintiff.*

VS.

STATE OF LOUISIANA, *Defendant.*

OBJECTIONS TO DECREE PROPOSED BY THE UNITED STATES AND STATEMENT IN SUPPORT OF OBJECTIONS.

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General, State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.

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OBJECTIONS TO DECREE PROPOSED BY THE UNITED STATES AND STATEMENT IN SUPPORT OF OBJECTIONS.

OBJECTIONS

Comes now the State of Louisiana, through its Attorney General, appearing herein solely for the purpose of objecting to the decree proposed by plaintiff herein, and without in any manner waiving but specially reserving all rights under its petition for rehearing herein, files its objections, as hereinbelow stated, to said proposed decree:

1.

Objection is taken to the language contained in the first sentence of the first paragraph of the proposed decree unless, following said sentence, the following

words are added: "to the extent of all governmental powers existing under the Constitution, laws and treaties of the United States."

2.

Objection is raised to the following language which appears in the second sentence of the first paragraph of the proposed decree:

> "The State of Louisiana has no title thereto or property interest therein."

3.

Objection is urged to the entirety of paragraph two of the proposed decree, for the reason that there is nothing in the Court's opinion which would support or authorize injunctive relief; the Court not deciding that the United States has title to the area described and it appearing that there is no congressional authority for the exercise by the United States or its lessees of the rights that the decree would enjoin.

Further, the proposed decree seeks to enjoin lessees of the State of Louisiana, who are not parties to this suit, "from carrying on any activities upon or in the submerged area" for the purpose of producing "petroleum, gas or other valuable mineral products," a decree that would not only cause great harm to the

State and to its lessees but to the Nation as well. For, as pointed out elsewhere herein there is no law by which the United States or any officers of the United States can presently authorize the continuation of such operations and if the injunction should issue they all would have to cease. And, an injunction that would so operate as suggested in the proposed decree would stop the useful work being carried on by oil operators at great expense for the production of petroleum that is needed for the National economy and National defense.

4.

Objection is taken to the language of paragraph three of the proposed decree ordering an accounting by the State of Louisiana to the United States.

WHEREFORE, Defendant prays that no decree be entered herein pending a decision on its petition for rehearing; that in the event but only in the event that said petition should be denied that the decree to be entered herein be limited to the following two paragraphs:

> "1. The United States is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Gulf of Mexico, lying seaward of the ordinary low-water mark on the coast of Louisiana, and outside of the inland waters, extending

seaward twenty-seven marine miles and bounded on the east and west, respectively, by the eastern and western boundaries of the State of Louisiana, to the extent of all governmental powers existing under the Constitution, laws and treaties of the United States.

"2. Jurisdiction is reserved by this Court to enter such further orders and to issue such writs as may from time to time be deemed advisable or necessary to give full force and effect to this decree."

Defendant further prays that if the Court should disagree with the foregoing proposal, then prior to the entry of any other decree Defendant have the opportunity to file additional brief in support of its objections and to be heard orally, either formally or informally, at the pleasure of the Court.

Respectfully submitted,

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

OCTOBER, 1950.

STATEMENT IN SUPPORT OF OBJECTIONS

1.

It is entirely obvious that the United States has no powers except those granted by the Constitution, or contained in the laws and treaties of the United States; and it is suggested that the addition of the words "to the extent of all governmental powers existing under the Constitution, laws and treaties of the United States" be made to the first sentence of the first paragraph of the proposed decree, so that the decree would then be consistent with what the Court actually decided in its opinion.

2.

The opinion or decision of the Court contains no statement that the State of Louisiana has no title or property interest in the lands, minerals and other things underlying the Gulf of Mexico within the area described in Article 2 of the Complaint. The opinion in *United States v. California*, 332 U. S. 19, did not justify the decree in that case (332 U. S. 805) in regard to title; the decree to that extent having been entered with California's acquiescence.

3.

Paragraph 2 of the proposed decree pretends to enjoin the State of Louisiana and all its lessees or

persons claiming under it from carrying on activities in the area described for the purpose of removing petroleum, gas or other valuable mineral products "except under authorization first obtained from the United States."

As pointed out more fully in a later paragraph hereof, there is nothing in the opinion to serve as a basis for title in the United States.

It is undeniably true that an injunction would cause the cessation of oil, gas and mineral activities in the area involved herein. This result would bring about the destruction of the very foundation upon which the decision in this case was based; for, the Court held in its opinion that "protection and control of the area are indeed functions of national external sovereignty. The marginal sea is a national, not a state, concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area." This, then, being the foundation for the Court's decision in this case, it is clear that an injunction would defeat the very principle or theory upon which the case was decided.

The brief of the State of Louisiana opposing Plaintiff's Motion for Judgment and supporting the

State's Motion to Dismiss and Other Defenses pointed out clearly, and it has not been denied by Plaintiff, that there is at present no Federal law authorizing any representative of the United States to grant leases or permits for carrying on such activities upon or in the submerged area described in Paragraph 1 of the proposed decree. It was proved without denial that there is no way in which the United States or its lessees or persons claiming under it could carry on the activities which the proposed decree would enjoin; and as the United States has no right to so operate or to permit others to operate upon or in the submerged area, there could be no right, in the absence of title and of congressional authority, to enjoin operations by the State of Louisiana or those holding under it.

Further, the proposed decree is without precedent, without legal foundation and without equity so far as it would operate against the Lessees of the State of Louisiana, or others claiming under it and who are carrying on operations for the production of petroleum and other mineral products from the submerged area. The Lessees are not parties to this suit. The motion of the State of Louisiana to have them made parties was opposed by the United States and denied by this Court, but in the face of the refusal to allow them to urge their rights, the proposed decree would now make

them parties to the suit by enjoining their activities under contracts made in good faith with the State of Louisiana.

It is common knowledge that the operators have spent hundred of millions of dollars for equipment and fixed structures for the production of petroleum from the submerged area, a production that this court has recognized to be of National concern. To enjoin the use of their own properties without making them parties to the suit would deprive them of their property in violation of the Fifth Amendment of the Constitution of the United States and without due process of law. Injunction is an equitable remedy; but there are no equities here to be served by enjoining operations that are in the National interest and at the expense of those who have acted in good faith.*

The decree in *United States v. California*, 332 U. S. 805, did not enjoin operations either by the State of California or its lessees. As this Court knows, the California case is still open to determine the boundaries between inland and outer waters. The United States recognizes that many questions will arise in this case as to the distinction between waters affected by the decree and those that are not within it. Yet, the broad terms of the proposed decree would leave the operators in a state of confusion, not knowing in many individual

*and who were denied opportunity to be heard this case.

cases whether their activities are within the dividing line or outside as it may be eventually fixed by final order of this Court. So, to say the least, the proposed injunction in the decree is now premature.

4.

In the written opinion and decision of the Court herein, no reference whatever was made to an accounting by the State of Louisiana to the Federal Government for money derived by the former from the area described in Article 2 of the Complaint.

An accounting for money received from real property can only be demanded by the holder of fee simple title or one having a proprietary right or interest. The United States was not declared to hold title to the lands and resources involved in this cause.

In this respect, the opinion or decision by the Court in this case, and the language contained in the proposed decree are contradictory; for the Court in its opinion or decision held that "the issue in this class of litigation does not turn on title or ownership in the conventional sense." In truth, the Court denied Louisiana a trial of the title question. Clearly, the Court's opinion must be construed as denying the fee title claim of the Untied States. In any event, the United States is not entitled to an accounting under the terms

In

of the Court's opinion or decision herein for the reason that the United States was not held to possess fee simple title to or proprietary interest in the lands, minerals and other things inolved in this cause.

It is equally clear that a financial accounting has no relation whatever to the obligation of the United States to protect the area of the marginal sea. There is no legal ground for holding or concluding that the State of Louisiana should be required to account to the United States because of the latter's obligations in the realm of external sovereignty, or in discharging its national duties under the Constitution of the United States.

Moreover, it is an irrefutable fact that the State of Louisiana has no current funds which could be appropriated for the accounting purposes aforesaid; but even if a large excess of revenues existed in the general fund of the State of Louisiana, this Court would have no jurisdiction to order the Louisiana Legislature to enact necessary laws to appropriate that money or any part thereof for the benefit of the United States. And, as there is no existing remedy held by the United States to require payment of such money to it, a decree by this Court ordering a financial accounting would be unenforceable.

And it should be kept in mind that if it could or should properly be held that the State of Louisiana

must account for monies that it has received; if title could be vested in the United States [redacted]* the State has none and if the State's lessees thereby acquired no legal right to operate in the area, good conscience would require the accounting to be made to those who show financial loss and who paid the State acting on decisions of this Court that had been unchallenged for more than a century and which supported State ownership of lands beneath navigable waters within their respective jurisdictions.

Respectfully submitted,

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.

CULLEN R. LISKOW,
Lake Charles, La.
Of Counsel.

*on the mere assumption that

MOTION FILED NOV 8 1950

IN THE

Supreme Court of the United States

October Term, 1950.

No. 12, Original.

UNITED STATES OF AMERICA, *Plaintiff,*

v.

STATE OF LOUISIANA, *Defendant*

SECOND PETITION FOR REHEARING

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.
JOHN L. MADDEN,
Assistant Attorney General, State of Louisiana.

L. H. PEREZ,
New Orleans, La.
BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.
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SECOND PETITION FOR REHEARING

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now the State of Louisiana and moves the Court for leave to file a Second Petition for Rehearing, as set forth hereinafter.

The ground of the petition is that a Rehearing is appropriate because of the nature of the opinion of the Court rendered herein on June 5, 1950 and the decree which has been proposed by plaintiff and the Objections thereto which have been filed by Louis-

iana. These raise entirely new matter and place the case in a radically new light, which makes it appropriate and necessary that this petition for a rehearing be granted.

I

Complaint Alleging Title, and Answer Denying Same and Setting Up Title in Defendant Constitute Action at Law Over Title and Right to Property

Complaint alleges that the United States was and is "the owner in fee simple of, **or** possessed of paramount rights in, and full dominion and power over, the lands, minerals, and other things underlying the Gulf of Mexico, lying seaward of the ordinary low-water mark on the coast of Louisiana and outside of the inland waters," within the State boundaries.

In its Answer, Louisiana denied the allegations of title in the United States and set up its own title to all said lands, minerals and other things underlying the Gulf of Mexico and all navigable waters within its territorial limits, subject to the constitutional paramount powers and rights of the United States in such area.

Thereby the issue of title was squarely placed before the Court and was triable at law.

True, the United States asked for an injunction against Louisiana, its lessees and all persons claiming under it, from trespassing upon the area in alleged violation of the rights of the United States and for an accounting of all sums of money derived by the

State from said area. Such prayer for injunction is only an incident to the main demand for title and possession of the property at issue, and does not change the character of the suit from an action at law.

There is a perfectly clear and orthdox remedy at law for the recovery of real property, and that is the common law action of ejectment. Plaintiffs seeking to circumvent the classic legal remedy of ejection by suing in equity, or by injunction to recover real property, have always been relegated to their remedy at law.

Scott v. **Neely,** (1891) 140 U. S. 106
Rocky Mountain Fuel Co. v. **New Standard Coal Mining Co.** (C.C.A. Colo. 1937) 89 F (2d) 147
Whitehead v. **Shattuck,** (1891) 138 U. S. 146
Smith v. **New Orleans Canal & Banking Co.** (1891) 141 U. S. 656
United States v. **Wilson** (1886) 118 U. S. 86
Fussell v. **Gregg** (1885) 113 U. S. 550
Ellis v. **Davis** (1883) 109 U. S. 485
Lewis v. **Cocks** (1874) 23 Wall. 466, 470
Ripp v. **Babin** (1857) 19 How, 271, 277

As was said in Whitehead v. Shattuck (1891) 138 U. S. 146 **supra.** (p. 151):

> "It would be difficult, and perhaps impossible to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said, that **where an action is simply for the re-**

> **covery and possession of specific real or personal property, or for the recovery of money judgment, the action is one at law.** An action for the recovery of real property, including damages for withholding it, has always been of that class. The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; **and in a contest over the title both parties have a** constitutional right to call for a jury." (Emphasis added).

And as was said in **Lewis** v. **Cocks**, 90 U. S. 466, 470:

> "It is the universal practice of courts of equity to dismiss the bill if it be grounded upon a merely legal title. In such case the adverse party has a constitutional right to a trial by jury. **Hipp** v. **Babin**, supra."

Moreover, the question of title and right to possession disputed between two sovereign States of the Union, Kentucky and Indiana, has been tried at law in an action of ejectment, by jury. **Hendly's Lessee** v. **Anthony** (1820) 5 Wheaton 374.

In addition, it is elementary that an injunction may not be obtained in order to take real property out of the possession of one party and put it into that of another.

Lacassagne v. **Chapuis** (1892) 144 U. S. 119
High on Injunction (2d Ed) 355
28 **American Jurisprudence** 332, "Injunctions", Sec. 132, 298
43 **Corpus Juris Secundum** 513, "Injunctions", Sec. 54

Moreover, all the lands under navigable waters are real estate in every sense; and it is the clear law in this Court that ejectment is the appropriate remedy for suing to recover lands under navigable waters.

Martin v. *Waddell*, 16 Pet. 367
Lowndes v. *Huntington*, 153 US 1
Morris v. *United States*, 174 US 196

As was said in *Morris* v. *United States*, 174 US 196, 230, *supra,*

> "Indeed, it was held in *Martin* v. *Waddell* that lands under navigable waters were subject to an action of ejectment."

Finally, the question as to who has fee simple title and the right to possession present a perfectly clear, triable issue of fact, provable by evidence of the widest character. As is stated in Section 269 American Jurisprudence:

> "269. PROOF OF TITLE TO, AND RIGHT TO POSSESSION OF, PROPERTY.—On an issue involving title or the right to possession of property, any evidence, not rendered inadmissible by some one of the exclusionary rules of evidence, such as the hearsay-evidence rule or the rule which excludes evidence by mere opinions of witnesses, which bears upon the issue of title or right to possession or characterizes the nature of one's possession is admissible. * * * *
>
> "In property cases where the title and right to possession of realty are in question, deeds and other muniments of title are admissible as tending to show title or right to possession as are public statutes and grants where they constitue title papers of a party; and where title by adverse possession is claimed, any act or series of acts which shows the open, notorious, exclusive, and hostile possession of the one who claims to be the owner of the land may be proved as evidence of adverse possession."

And as was said in **Smyth** v. **New Orleans Canal & Banking** Co. (1891) 141 U. S. 656, where a suit in equity in which the Plaintiff sought "to have his alleged title adjudged to be valid" was dismissed on the ground that the plaintiff had an adequate remedy at law in ejectment (p. 661):

> "The **facts** upon which a title to the premises in controversy rests, or by which such title can

be defeated, can be readily shown in an action at law."

"In a single action at law all the **facts** can be established, and all the questions necessary to determine the right to the property can be considered and disposed of". (Emphasis added.)

Louisiana has always been prepared to present a very considerable amount of evidence of the widest character to prove her undisputed title and right to possession of the marginal sea bed off Louisiana for more than 136 years.

II

Plaintiff Made Disjunctive Claim to Title or Paramount Power; Abandoning Claim to Title and leaving No Justiciable Controversy Because Constitutional Paramount Power and Rights of United States Admitted and Never Questioned by Defendant.

Plaintiff's claim as the owner "in fee simple of, **or** possessed of paramount rights in and full dominion and power over, the lands, minerals", etc. in the area described, is stated in the disjunctive,—the plaintiff indicating that it claimed either one of two very different things, (1) fee simple title, or (2) paramount rights, dominion and power over the area in question, but not both title and paramount rights, etc.

It has been pointed ou before that the United States prior to the decision of June 5, 1950, had abandoned its claim to fee simple title, as in fact, this Court had denied its claim o fee simple title in the

California case; but the Court's opinion in this case failed to recognize that legal situation.

There is no issue in this case as to "paramount rights", etc. of the United States, because, in its answer, Louisiana admitted all and whatever paramount powers, right, etc. the United States may have over Louisiana's navigable waters and the soils and resources under them, as provided in the Constitution, laws and treaties of the United States.

Neither the plaintiff's attorneys nor the Court can substitute any such issue or justify any judgment or decree based on any controversy between Louisiana and the United States over the paramount powers, rights, etc. of the United States, under the Constitution, laws and treaties of the United States, because it is of record in the pleadings of this case that Louisiana has admitted them and no justiciable controvery, therefore, exists on this question.

Neither can such ficticious issue be seized upon to justify the issuance of an injunction against the State of Louisiana, unless such injunction be used as a subterfuge to avoid a trial at law on the question of title and right to the property and thereby indirectly place title and the right of possession to such property in the United States and confiscate the property of the State of Louisiana without trial or hearing on the merits and without due process of law.

In this regard, the Louisiana case also is radically different from the California Case, in which

that State argued to this Court that the United States had no "power or jurisdiction" over the lands underlying navigable waters for California and that the State "alone had the jurisdicion to regulate" that area. California Brief p. 104 and Appendix p. 159.

In that case, this Court rejected that argument by stating that the area there involved could not be "blocked off", or "set apart" for exclusive use by the State. 332 U. S. 1, 25.

No such situation exists in this case, and the California Case, therefore, cannot be accepted as precedent for this case.

Furthermore, it is admitted that Congress has the exclusive authority to establish and assert federal policy within its constitutionally delegated powers.

It must be admitted, further, that Louisiana has exercised no right, nor has it enacted any law in conflict with any legislation by Congress.

Therefore, under most recent decisions of this Court, where Congress has not exercised rights it may have, this Court held that it was not the holding in the California Case that States did not have the power to preserve and regulate the exploitation of important natural resources in the sea, within their boundaries, in the absence of federal legislation on the subject or in the absence of a conflicting federal policy. **Toomer** v. **Witsell**, 334 U. S. 385 and **Skiriotes** v. **Florida**, 313 U. S. 69.

III.

California's Case Radically Different from This Case.

In its original opinion, this Court denied Louisiana a hearing on the merits of the case, thereby denying the State the right to present its evidence against the claim of title by the United States and in support of its own title.

The Court said it thought **United States v. California,** 332 U. S. 19, controlled this case and there should be a decree for the complainant.

In fact, the circumstances in the California Case and this Case are radically different.

In the California Case, as this Court held, neither the United States nor California "suggested any necessity for the introduction of evidence". 67 S. Ct. @ 1661.

However, as vigorously as a litigant in this Court may do so, Louisiana sought a trial on the merits of the issue of fee simple title, in order to disprove the claim of title by the United States and to prove its own title to the property in question; but this Court refused to give defendant its day in Court and denied it the right to offer evidence in support of its title, contrary to all rules of procedure in courts of law and justice in these United States.

Furthermore, the California case, taken as precedent by this Court, is radically different from this case, in that when plaintiff submitted a form of de-

cree in the California case reciting that "The State of California has no title thereto or property interest therein",—the State of California made no objection thereto and, in effect, acquiesced in the inclusion of such statement in the Court's decree.

To the contrary, Louisiana has objected to the decree proposed by the United States, particularly against the inclusion of the statement that, "The State of Louisiana has no title thereto or property interest therein"—with supporting reasons.

IV.

Evidence Should Be Heard Regarding Title of Original States and of Defendant to Their Submerged Lands and Resources Before Final Decision in This Case.

In the California Case, the Court said they had been referred to no document, treaty or chapter, which showed that the original colonies or states had acquired ownership to the "three mile ocean belt" or the soil under it.

This "three mile ocean belt" reference showed conclusively a complete lack of information and understanding by the Court, because of the failure of introduction of evidence on the subject in the California Case.

All evidence of title in the Original States to their maritime belt and soil and resources thereunder, within their boundaries, is relevant to the issue in this case because Louisiana, as a State since admtted on an

equal footing with the Original States, has the same sovereignty and proprietary rights to its maritime belt and the soil and resources thereunder as the Original States.

Louisiana has been and is prepared, and should not be denied the right, to introduce in evidence the charters of the original colonies, which would show that the British Crown vested fee simple title in them to the soils, minerals, etc. within the main land, the islands and seas adjoining in some cases, 10, 20 and 100 leagues from shore, and that by the Declaration of Independence of 1776 and the Treaty of Peace between the Original States and the British Crown in 1783, the British Crown relinquished to the Original States, separately and by name, all of the rights and title of the British Crown to its maritime belt and the soils and resources thereunder.

The following are excerpts from some of these original charters and treaty, which should be received in evidence of the title of the Original States:

British Crown Charters:

1. First North Carolina Charter, March 25, 1584, conveying all the soil of such lands, with the rights, royalties, franchises and jurisdictions as well marine as other, within the said lands, or countries, **or the seas thereunto adjoining.**
2. The Virginia Charter, March 9, 1611, annex- all islands within 300 leagues of the coast, conveying the **soils,** lands, grounds, **minerals, etc.,** both **within the** said tract of land upon the main, and also within said islands and **seas adjoining**, etc.

3. The Plymouth Colonial Charter, Nov. 16, 1620, granting all territories throughout the mainland with, **all the seas**, rivers, islands ports, both within the same tract of land upon the main; also within the said islands and **seas adjoining**.

4. Charter of Massachusetts Bay, 1691, defining the boundary "throughout all the main land from **seas to sea**, together also with **all soils, royalties upon the main and also within the islands and seas adjoining.**"

5. Grant to the Council of Plymouth, confirmed April, 1639, granting "all and sigular prerogatives, royalties, **as well by the sea as by land** within the said province and coast of same and within the **seas** belonging or adjacent to them."

6. New Hampshire Grant, confirmed April 22, 1635, conveying "the **seas** and islands lying witnin any 100 miles of any part of said coast of country aforesaid, together with **all the firm lands, soils, waters, fish, royalties**, both within the said tracts of lands **upon the main and also with the islands and seas adjoining.**"

7. Charter grant to Lord Baltimore for Province of Maryland, June 30, 1632, conveying "all that part of the peninsular lying between the ocean on the East and the Bay of Chesapeake on the West, from Watkins Point to the main ocean on the East, the islands which have been or shall be formed within **the sea within 10 marine leagues from the shore**; with all ports, harbors, bays and straits belonging to the region or islands aforesaid within 10 marine leagues from shore; **and all soil, with the fishings in the sea, with all prerogatives, royalties, as well by sea as by land within the limits aforesaid.**"

8. Georgia Charter, June 9, 1732, conveying "all the precincts of land within the said boundaries, with the islands on the sea lying opposite to the Eastern coast of said lands, **within 20 leagues of the same, together with all the soils, gulfs and bays, mines, waters, fishings, royalties, in any sod belonging or appertaining.**".

Further, the Treaty of Independence with the British Crown of April 11, 1783 acknowledged the United States, naming the 13 Original States each by name, to be free, sovereign and independent states, and stating that the British Crown treated with **them** as such and relinquished unto **them** all claims to the **government, proprietary and territorial rights** of the same and every part thereof; and, in Article 2, agreed upon and declared the boundaries of the said named 13 Original States to extend into the Atlantic Ocean, comprehending all islands **within 20 leagues of any part of the shores of the United States.**

In Harcourt v. Gaillard (1827), 12 Wheat. 523, this Court held that that treaty was "the most solemn of all international acts", and that there was no territory within the United States that was claimed in any other rights than that of some one of the confederate states; and, therefore, there could be no acquisition of territory made by the United States, distinct from, or independent of, some one of the states.

The Court further held that both Original States, South Carolina and Georgia **had acquired their original title by grants from the Crown; and that the limit of their claims was asserted by both States in Declaration of Independence and the right to it was**

established by the most solemn of international Acts, the Treaty of Peace.

The Court will note from this most solemn treaty, which also is the supreme law of the land, under our Constitution, that the boundaries of the Original States were not fixed at "three miles;" nor was the claim to any such alleged three-mile belt first asserted by the national government, as stated in the opinion of the California Case and in this Case.

This international treaty has never been questioned by the Government of any other nation. All the waters within those 20 leagues (not 3-miles), off the shores of the Original States constitute our domestic waters.

For purposes of national defense and international relations, the United States, undoubtedly, has paramount power and dominion over these 20 leagues and they should not be restricted to three-miles in the decision of such important cases, especially without the taking of evidence to properly inform the Court.

Unless this Court in the California Case meant to overrule every one of the scores of prior U. S. Supreme Court decisions in point, it still is the settled jurisprudence in this country that,

> "When the revolution took place, the people of each state, themselves, became sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."

Martin v. **Waddell** (1842), 16 Peters 367, 410;
Mumford v. **Wardwell** (1867), 6 Wall. 432, 436;
County of St. Clair v. **Lovingston** (1874), 90 U. S. 46, 68;
McCready v. **Virginia** (1867), 94 U. S. 391, 394;
Schivley v. **Bowbly** (1893), 152 U. S. 1, 16;
Massachusetts v. **New York** (1926), 271 U. S. 65, 85.

In Johnson v. **McIntosh** (1823) 8 Wheat. 543, 584, adjudcating upon lands in controversy within the chartered limits of Virginia, this Court, through the great Chief Justice Marshall, unanimously held:

> "By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the 'propriety and territorial rights of the United States' whose boundaries were fixed in the 2d article. By this treaty, the **powers of government, and the right to soil,** which had previously been in Great Britain, **passed definitely to these states.**" (Emphasis supplied).

To the same effect, as to Maryland, another Original State, **Smith** v. **Maryland**, 59 U. S. 18 How. 71, 74.

May we pause here, and ask if the powers of government, also secured by the people of the original States in their collective sovereignty by the same Declaration of Independence and Treaty of 1783, and not delegated to the United States government in the Constitution, and acquired by all States since admitted into the Union on an equal footing with the original States, may be destroyed or nationized by decree or "injunction" of this Court?

In short, can the sovereignty of all States of the Union be destroyed by arbitrary decree or "injunction" without trial, as sought here by the Attorney General?

And as to new States admitted on an equal footing with the Original States, this Court has consistent held that:

> "The new States admitted into the Union since the adoption of the Constitution have the same rights as the Original States in the tidewaters and in the lands under them within their respective jurisdictions. The title and rights of riparian are littoral proprietors in the soil below high water-mark, therefore, are governed by the laws of the several States subject to the rights granted to the United States by the Constitution".

Pollard v. **Hagen** (1845), 3 How. 212.
Schively v. **Bowbly** (1893), 152 U. S. 1;
Port of Seattle v. **Oregon & Washington R. R.** Co., 225 U. S. 56, 63;
Memford v. **Wardwell** (1867), 6 Wall. 423, 436;
Weber v. **Harbor Commissioners,** 18 Wall, 57;
Borax Ltd. v. **Los Angeles,** 296 U. S. 10;
I. C. R. R. Co. v. **Illinois** (1892), 146 U. S. 435, (same as to Great Lake States).

Evidence will show that Louisiana formed a part of the original Louisiana territory ceded to the United States by France under the Treaty of 1803, and was admitted into the Union on the same footing as the Original States.

In 1836, this Court held that such public property as the rivers, the sea and its shores were formerly

held by the Crown under the French and Spanish laws for the common use of men, which the King could not alienate, and that as to such public properties, which were public by nature, including the river bank or quay at New Orleans, the United States had not acquired title under the Treaty of Cession, but that title to such properties, (the rivers, the sea and its shores), passed to the people of Louisiana by the French Treaty of 1803. **New Orleans v. United States**, 10 Pet. 662, 731.

This decision along with the treaty, constitute muniment of title to the people or State of Louisiana, and should not be lightly "put to one side", as the Court said in its opinion, without even permitting the introduction of any evidence as to Louisiana's title. The principle of law which was adopted by the Court in that case involved not only the quay or river bank in question but also the sea and its shores within the State boundaries, and is most pertinent here.

Further, in **Louisiana v. Mississippi**, 202 U. S. 1, 52, 53, the Court held "The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States."

V.

Paramount Power and Dominion of the United States Does Not Change Character of Action from One at Law to Equity, Nor Justify Confiscation of Property.

In the California Case, this Court said the United States asserted rights in two capacities, transcending

those of a mere property owner, the first being the ercise of power and dominion necessary in the national defense and the other being as a member of the family of nations.

Neither of these paramount rights of the United States conflict with property rights of states or of individuals, and if that finding is held to justify the confiscation of property of the state held in trust for its people in their collective sovereign capacity, then that decision would mark the end of the right of private ownership of property in this country as well,—for the United States owes the same obligation of national defense and international relations to all privately owned property in this country as well as to the property of the states which are submerged under their navigable waters within their boundaries. All classes of property, private and State publicly owned alike, are subject to regulation and control under the paramount powers of the United States found in the Constitution, laws and treaties of this country.

Such national defense and international obligations of the United States, however, do not change the character of this litigation over title to property from that of an action at law to one in equity to be decided by the issuance of injunction, nor does it justify confiscation of defendant's property without trial on the merits.

Further, if the property of a state, the same as that of an individual, be it submerged land or oil

within its navigable waters, be needed for national defense or other public purposes, the government may resort to its power of eminent domain and may expropriate the same upon payment of just compensation, wherever necessary in the interest of national defense or of any of the other constitutional rights and powers of the U. S. Government.

Confiscation and nationalization of property, without compensation, cannot be condoned under our Constitutional form of government, the American-way.

In this case, the Court states, "The issue in this class of litigation does not turn on title or ownership in the conventional sense."

Therefore, since there was no consideration of the issue of title or ownership of the property in question, and defendant was refused the right to introduce evidence of title, no decision or decree should be rendered by the Court which would take the property away from defendant and give it to plaintiff by the subterfuge of a writ of injunction prohibiting defendant and its lessees and licensees from continuing to use its property as it has done since 1812.

It is a long established principle of law, consistently acknowledged by this Court that a plaintiff must recover by the strength of his own title, not the weakness of his adversary's. **Harcourt** v. **Gaillard** (1827) 12 Wheat. 523, 529.

Furthermore, it is well established jurisprudence as held in **Indiana** v. **Kentucky**, (1889), 136 U. S. 479, that,

> "For the security of rights, either of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be injected with greater justice and propriety than in the case of disputed boundary."
>
> " . . . . the constant and approved practice of nations shows that by whatever name it be called, (prescriptions?) the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other in the same manner as, by law of nature and the municipal code of every civilized nation, a similar possession of an individual excludes the claims of every other person to the article of property in question." Vattel, in this law of Nations, Part II Chap. IV par. 164.

Arkansas v. **Tennessee** (1940), 310 U. S. 563, 570-571.

Wherefore, the State of Louisiana moves that leave be granted to file this petition for rehearing and that the case be restored to the docket for reargument, and upon consideration, the petition be granted and the decision previously rendered be reversed and the complaint dismissed, or that, in the alternative, the case be fixed for trial in accordance with law and with full opportunity for defendant to

submit its evidence of title, and for judgment as prayed for by defendant, all in accordance with the Constitution and laws of the United States.

Respectfully submitted,

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General
State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,

F. TROWBRIDGE VOM BAUR,
Washington, D. C.

CULLEN R. LISKOW,
Lake Charles, La.
Of Counsel.

I hereby certify that the within Petition for Rehearing is believed to be meritorious and is well founded in fact and in law, and that it is presented in good faith and not for delay.

BOLIVAR E. KEMP, JR.
Attorney General,
State of Louisiana.

Office-Supreme Court, U. S.
FILED
NOV 30 1950

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 12, Original

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STATE OF LOUISIANA, *Defendant*.

REPLY TO PLAINTIFFS MEMORANDUM ON PROPOSED DECREE

BOLIVAR E. KEMP, JR.
Attorney General,
State of Louisiana

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.

CULLEN R. LISKOW,
Lake Charles, La.
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 12, Original

UNITED STATES OF AMERICA, *Plaintiff*.

v.

STATE OF LOUISIANA, *Defendant*.

REPLY TO PLAINTIFFS MEMORANDUM ON PROPOSED DECREE

The memorandum filed by the plaintiff "in regard to Louisiana's Objections to the proposed Decree", portrays a complete absence of any legal basis whatever for the position in which the United States now finds itself. Said memorandum further shows that the proponents are on the defensive and are at a loss to justify their proposed decree under the Constitution, laws and treaties of the United States. We submit that it compels the conclusion that there is now no case or controversy before this Court and that the Complaint should be dismissed.

Point One

The Issue of Fee Simple Title Has Been Eliminated by the Court from This Case.

The Solicitor General states that there is no basis for Louisiana's objection to including in the proposed decree the sentence that, "The State of Louisiana has no title thereto or property interest therein". But his assertions, we submit, are fully answered by the fact that this Court in its decision herein on June 5, 1950, definitely stated that this litigation "does not turn on title or ownership in the conventional sense".

That the issue of title to Louisiana's submerged lands and resources was not decided by the Court in this case is further shown by the Court's refusal to grant Louisiana a trial on the issue of title to its marginal seabed and the lands and resources therein, after the Court had stated that (1) Louisiana in her answer had denied that the United States has fee simple title to the lands, minerals or other things underlying the Gulf of Mexico within her boundaries; (2) had set up affirmative defenses that she is the holder of fee simple title to all said lands, minerals and other things; and (3) that Louisiana had also moved for trial by jury on the ground that this action is essentially one to recover possession of real property, that is, the soil and resources of the marginal sea off Louisiana and so is essentially an action at law in which the State is entitled to a jury trial under the Constitution and Laws of the United States.

So, the Court eliminated the issue of title.

Point Two

Moreover, Plaintiff Has Now Specifically Abandoned All Claim to Fee Simple Title.

The plaintiff has now actually abandoned, in its proposed Decree, the very claim to fee simple title to Louisiana's tidelands and mineral resources—the marginal sea-

bed of Louisiana—which plaintiff made in its complaint. Paragraph II of its complaint alleged as follows:

> "At all times herein material, plaintiff was and now is the owner in fee simple of, or possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Gulf of Mexico, * * * "

But Paragraph 1 of the Decree proposed by plaintiff carefully omits the claim to fee simple title disjunctively made in the Complaint, merely asking that this Court decree that:

> "The United States is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Gulf of Mexico, * * * "

So the plaintiff, having now abandoned its claim to fee simple title, the question of who has fee simple title is not before the Court in any respect whatever, and cannot be the basis of any decree.

Point Three

The California Decree Is No Precedent Whatever in This Case.

The California decree is no precedent whatever for the decree in this case, because there, California, in effect, consented to the entry of a decree which was proposed by the United States as plaintiff which stated that California had no title to the property. The decree in the California case was to that extent, therefore, a judgment by consent.

We submit that whatever the effect of that decree may be for California, it does not bind Louisiana at all. Louisiana has never consented to any such stipulation. She has always stood, and will ever stand, ready to submit evidence of the widest character portraying her fee simple title to

and right to possession of the area involved, undisputed for more than 136 years.

Point Four

There Is No Case or Controversy Regarding the Constitutional Paramount Rights, Powers and Dominion of the United States Over the Marginal Sea Within Louisiana's Boundaries.

There is no possible controversy over anything in this case except fee simple title. Even the Solicitor General himself said so, specifically, in his testimony before the Senate Committee on Interior and Insular Affairs, on October 4, 1949.

He then stated that the Government's claim to the tidelands and their mineral resources was based on the claim of title, and that if the United States did not have title, it was not entitled to them. See Hearings before said Committee, Pages 56, 180.

The Court's decision in this case definitely eliminated the question of fee simple title by holding that this litigation did not turn on title or ownership of the property in question. Necessarily, therefore, the question of title cannot be revived by the suggestion on Page 5 of Memorandum in Support of the Proposed Decree that the United States should have fee-title and ownership or proprietorship to the lands under navigable waters within Louisiana's boundaries.

And there never has been any controversy over the constitutional "paramount rights", "powers", "dominion" etc. of plaintiff over the marginal sea off Louisiana; for Louisiana has never denied them, and she has specifically admitted them in this litigation. Hence there are no "conflicting claims of governmental powers" here, as there were with California, (332 U. S. 1, 25); here there simply is no case or controversy whatever before this Court which could be used as the basis for a decree; and the complaint should be dismissed.

The supreme or paramount character of the rights, powers and dominion of the United States within its delegated governmental sphere has been the recognized law and jurisprudence in this country since at least 1819, when this Court, through Chief Justice Marshall, in *McCulbough v. Maryland*, 4 Wheat 403, held:

> "If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the union, though limited in its powers, is supreme within its sphere of action."

It is not amiss to point out that, so far as we have been able to ascertain, the phrase "paramount right" arose in the leading case of *McCready v. Virginia*, (1876) 94 U. S. 391. In that case the Court held:

> "The principle has long been settled in this Court that each state owns the beds of all tidewaters within its jurisdiction, * * * (cases cited). The title thus held is subject to the **paramount right** of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States". (Pages, 394,.395) (Emphasis added)

However, if a case or controversy could now be manufactured in this case with respect to "paramount rights, power or dominion" of the United States, where none exists because of the fact that Louisiana has never denied them, but to the contrary has consistently admitted them; then, in that event, Lousiana's Objections to Paragraph 1 of the Proposed Decree would be appropriate. Lonisiana's Objection was merely that the following words should be added to the proposed paragraph: "to the extent of all governmental powers existing under the Constitution, Laws and Treaties of the United States."

Unless the Executive Branch of the Government is arguing that this Court should decree it powers over and beyond those conferred by the Constitution, we submit that the words of Constitutional limits, quoted above, would

be essential. But again, we must point out that there is no issue before this Court as to "paramount rights", "power", "dominion", etc. of the plaintiff over the seabed within Louisiana's boundaries, and hence there is no basis for a decree on that subject, either.

Point Five

Plaintiff Now Asks This Court to Clothe It With the Very Power that Congress Has Specifically Refused to Grant, and Thus to Extinguish the Separation of Powers Embodied in the Constitution.

Plaintiff now asks this Court to empower what Congress has specifically refused to grant. The effect of the argument is to seek to extinguish the separation of powers embodied in the Constitution.

Plaintiff's position in its Proposed Decree in so far as it seeks an injunction is necessarily based on an assumption that plaintiff has fee simple title to lands under navigable waters within Louisiana's boundaries. We have shown above that that issue was eliminated by the Court; that plaintiff has now specifically abandoned, in its Proposed Decree, all claim to fee simple title; and that the issue of fee simple title is not now before the Court to become the subject of any decree.

From a different approach, however, perhaps nothing portrays plaintiff's utter lack of right to an injunction, accounting, etc. and the fact that it does not have fee simple title, than the action of Congress. For Congress has specifically refused to grant the plaintiff power to explore, lease, etc. the area involved. And from this we must infer that even Congress has firmly recognized that plaintiff does not have fee simple title to the area involved.

Further, plaintiff, having applied to Congress for the necessary legislative authority to lease, explore, take out, etc., the minerals in the marginal sea, and having been specifically refused such authority only three years ago, now asserts that the judicial power, through this Court, may do

what the legislative branch of the government has specifically refused to do. It needs no argument to demonstrate that this Court does not possess the legislative power assigned by the Constitution to Congress.

We may point out that plaintiff has placed itself in this feeble position through its own efforts. Not having fee simple title to the marginal seabed, and having now even abandoned all claims to fee simple title, plaintiff nevertheless wants to stop the oil drilling operations of Louisiana and its lessees. That such a cessation of operations would be disastrous to the national economy and the present grave emergency is something of which this Court may take judicial notice. In an effort to avoid these catastrophic consequences plaintiff now grandiosely asserts that the Secretary of Interior will permit the oil drilling operations to continue on such terms and provisions as he may see fit to grant, and that he should be considered by this Court, therefore, to possess the very authority to explore, lease, operate, etc. which Congress refused to purport to grant to him.

Thus, plaintiff nonchalantly asserts that, to be sure, Congress has enacted no such legislation, and that it has been held that the Mineral Leasing Act of February 12, 1920, 41 Stat. 437, as amended, does not apply to submerged lands of the type here involved,[1] but that regardless of the

[1] "After the Supreme Court decision in the California case, the question whether the Mineral Leasing Act applied to these areas became material. On August 8 and 28, 1947, the Solicitor of the Department of the Interior and the Attorney General, respectively, held that the act did not apply to the submerged coastal areas. Accordingly, on September 8, 1947, the Director of the Bureau of Land Management denied the applications pending in that Bureau, and on October 6, 1947, the Secretary of the Interior denied the applications pending in his office.

"There is no reason to think that the legal conclusions of the Solicitor and the Attorney General, and the consequent administrative actions denying all the then pending applications can be successfully challenged in the courts."

(Statement of Solicitor General, page 30, pamphlet "Submerged Lands", Government Printing Office, report of "Hearings before the Committee on Interior and Insular Affairs

absence of any Act of Congress, the Secretary of the Interior stands ready to authorize continued production of minerals from the States' tidelands and has full power to make "interim arrangements" to protect and preserve the lands and resources "adjudged" to the United States, and he points to an Executive Order, No. 9633.

Parenthetically, plaintiff can point to no "adjudging" of the tidelands and their mineral resources to the United States, because that would imply a holding that the United States has fee simple title thereto, contrary to the decision of this Court that title was not the issue in this case and to the fact that plaintiff has now actually abandoned all claim to fee simple title. And it is contrary, by analogy, to the Court's decree in the *California* case, where the United States was specifically denied proprietary rights in the tidelands and their resources, and which is a legal adjudication that the United States does not have fee simple title to the California marginal sea area.

U. S. Senate, 81st Congress, 1st Session", bills S. 155, S. 923, S. 1545, S. 1700 and S. 2153.)

Oil and Gas, (Act of February 25, 1920) secs. 13 and 14, 30 U. S. C. 221-236; oil shale, 30 U. S. C. 241; phosphate, 30 U. S. C. 211-214; sodium, 30 U. S. C. 261-163; potash, 30 U. S. C. 281-287; sulphur, 30, U. S. C. 271-276.

By Act, August 7, 1947, 30 U. S. C. 352, the Secretary of Interior was authorized to lease for oil and other minerals "acquired lands of the United States", to which the mineral leasing laws had not been extended; but it was provided: "That nothing in this chapter is intended, or shall be construed, to apply to or in any manner affect any mineral rights, exploration permits, leases or conveyances nor minerals that are or may in any tidelands; or submerged lands; or in lands underlying the three-mile zone or belt involved in the case of the United States of America against the State of California now pending on application for rehearing in the Supreme Court of the United States; or in lands underlying such three mile zone or belt, or the continental shelf, adjacent or littoral to any part of the land within the jurisdiction of the United States of America". The mineral leasing laws were not only not extended to the marginal sea, but Congress positively asserted that the Secretary of Interior should not exercise such authority under the law.

In apparent support of the Secretary of Interior's alleged power, the Solicitor General cites statements made to the Senate Committee on Interior and Insular Affairs, by the Attorney General and Solicitor for the Department of Interior during the Committe's hearings on S. J. 195, 81st Congress, which Resolution proposed to purport to confer interim authority in the Secretary of the Interior to administer the mineral resources in the States' tidelands.

But Congress did not enact S. J. Res. No. 195. It died aborning in the Senate Committee on Interior and Insular Affairs after a thorough hearing in August, 1950. The Congress of the United States undoubtedly refused to enact such legislation because it would thereby have adopted a policy of nationalization and confiscation of property, wherever the constitutional paramount powers and dominion of the United States extend, **and that is everywhere in the United States.**

Plaintiff's argument that, Congress having specifically refused to grant the authority sought, the judicial power should decree it, has far reaching implications. Such a contention would destroy the separation of powers around which the Constitution is constructed, extinguish the role of Congress, and transfer the legislative power to the judicial branch of the government.

The United States Constitution, Art. I, Sec. 8 provides:

> "The Congress shall have power . . . to regulate commerce with foreign nations and among the several states . . . to define and punish . . . offenses against the law of nations; and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." Article I, Section 8, Constitution of the United States.

The Supreme Court of the United States throughout its history on many occasions consistently has held that,

> "In the United States, sovereignty resides in the people, who act through the organs established by the Constitution. Chisholm v. Georgia, 2 Dall. 419, 471; Penhallow v. Doane's Administrators, 3 Dall. 54, 93; McCulloch v. Maryland, 4 Wheat. 316, 404, 405; Yick Wo v. Hopkins, 118 U. S. 356, 370.

And:

> "But until congress has acted, the courts of the United States cannot assume control over the subject as a matter of Federal cognizance. It is the Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several States. The courts can never take the initiative on this subject." Transportation Co. v. Parkersburg, 107 U. S. 691, 700, 701.

And, again, in *Manchester* v. *Massachusetts*, 139 U. S. 240, this Court held that there was no power over a natural resource in the federal authorities which Congress "does not assert by affirmative legislation" (p. 266).

As against the suggestion of the Solicitor General that an executive order be given the force of legislation, to bypass Congress, it is well to refer to the statement made by an Associate Justice in *Adamson* v. *California*, (1947) 332 U. S. 46, 67 S. Ct. 1672, 1682 that

> "We must be particularly mindful that it is a *Constitution* we are expounding" and that the guidance of the past "bids us to be duly mindful of the heritage of the past, with its great lessons of how liberties are won and how they are lost".

CONCLUSION.

Louisiana reiterates its pleas and supporting memoranda herein and submits that the complaint should be dismissed for the following reasons:

1. This Court refused to permit Louisiana to submit her evidence in proof of her fee simple title to and right to

possession of the area involved, undisputed for more than 136 years. It eliminated the issue of fee simple title. Now, in its Proposed Decree, plaintiff has specifically abandoned the very claim to fee simple title which it made in its complaint. Accordingly, the whole matter of fee simple title is not now before this Court to become the basis of any decree at all.

2. There is not, and never has been, any case or controversy before this Court with respect to the constitutional paramount rights, dominion and power of the plaintiff over the area involved; and we defy the plaintiff to conjure up the slightest scintilla indicating any such thing. Indeed, we may say frankly that the hullabaloo raised by the plaintiff over its "paramount rights in, power and dominion over" the area involved is sheer nonsense, wholly without substance, and that there is no case or controversy between the United States and Louisiana to provide a basis for a decree on that subject.

3. In the face of the foregoing, by seeking, nevertheless, to have this Court clothe plaintiff with the very authority to explore, lease and take out the minerals in the area involved, which Congress specifically refused to grant to it, plaintiff raises a contention with vast implications. It would necessarily destroy the separation of powers and disrupt our system of government.

If this Court should now sustain the contention of the Solicitor General that an Executive Order or Judicial Decree should be substituted for the constitutional legislative prerogative of Congress, then it might well follow that an Executive Order might be written to abolish the Congress altogether. Or the Solicitor General could then ask for a judicial decree suspending the constitutional powers of Congress.

4. Finally, what plaintiff apparently seeks as a practical matter, if we are to be frank about it, is "nationalization"

—confiscation by the federal government—of the lands, minerals, etc. underlying the navigable waters within Louisiana's boundaries. But that claim has no legal basis; we submit, therefore, that it has no standing within the walls of the Constitution and the tradition of this Court.

The pending Petition for Rehearing should be granted and the complaint should be dismissed; or the case should be restored to the docket for argument on the Proposed Decree and Louisiana's Objections.

Respectfully submitted,

BOLIVAR E. KEMP, JR.
Attorney General,
State of Louisiana

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.

CULLEN R. LISKOW,
Lake Charles, La.
Of Counsel.

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Supreme Court of the United States

October Term, [redacted]. 51

No. 7, Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

PETITION FOR REHEARING ON DECREE.

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General, State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.

CULLEN R. LISKOW,
Lake Charles, La.
Of Counsel.

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Supreme Court of the United States

October Term, 1950.

No. 12, Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

PETITION FOR REHEARING ON DECREE.

Comes now the State of Louisiana and petitions the Court for a rehearing of its decree herein entered December 11, 1950.

Point One.

This Court Assumed Jurisdiction of This Case Without Right or Authority Under the Constitution.

The Attorney General and Solicitor General have summarily dragged the Sovereign State of Louisiana before the bar of this Court seeking to deprive Louisiana of the lands under navigable waters within Louisiana's boundaries to which Louisiana has had undisputed title, possession, and physical control since 1812.

Louisiana contested the jurisdiction of the Court on two grounds, (a) that Louisiana was a Sovereign State and had

not consented to be sued, and (b) that this Court had no controversy over a suit between the United States and a State.

The jurisdictional question was extensively briefed and orally argued by both sides, on the Motion for Leave to File a Complaint against Louisiana. But this momentous question was passed on by the Court with the single word that the motion was "granted". Subsequently, in its opinion of June 5, 1950, the Court said that Louisiana contended that she had "not consented to be sued by the Federal Government", and reaffirmed *United States* v. *Texas*, 143 U. S. 621 as having held that Article 3, Section 2, Clause 2, of the Constitution included "cases brought by the United States against a State".

But nowhere has this Court ever indicated a reason why Louisiana should be summarily dragged before the bar of this Court when she has not consented to be sued. *Kansas* v. *United States*, (1904) 204 U. S. 331 held that Kansas could not drag the United States before the bar of this Court without its consent to be sued; and what applies to the one must apply to the other. Why indeed should the United States be able to summarily hale a State before the bar of this Court if, in turn, the State may not do the same thing with the United States? Perhaps it was the intention of this Court to overrule *Kansas* v. *United States;* but it has given no reason for its decision.

The record of the Constitutional Convention shows that on June 7, on August 20, on August 22 and on August 30, 1787, proposals were submitted to the Convention to grant this Court original jurisdiction in controversies between the United States and an individual State and that no vote or action was taken on these propositions. (H. Doc. 398, 69th Cong., 1st Session, pp. 769, 973, 572, 595, 644; 1 Elliott's Debates pp. 177, 180; and the Madison Papers, Vol. 3, pp. 1366, 1399, 1465, 1466).

However, that on August 30, 1787, when the proposition was lastly submitted to the Convention that claims to terri-

tory or other property by the United States or any particular State should be examined into and decided upon by the Supreme Court of the United States, this motion was peremptorily rejected by vote of 8 States against and only 2 States for the motion. (H. Doc. 398, p. 645; 1 Elliott's Debates pp. 275, 276).

Also, while this Court stated that the *Texas* case had held that this Court had original jurisdiction of cases brought by the United States against a State, it made no mention of *Florida* v. *Georgia*, (1854) 17 How. 478, in which the Attorney General of the United States stated that "The Court is not empowered by the Constitution to entertain an original suit between the United States and a state or the United States and two states".

Louisiana is not an ordinary litigant. She is a Sovereign in her own right and a State of the Union. And the question whether the United States may summarily drag her before the bar of this Court without her consent, so far as we can see, is an important question. It concerns not only Louisiana, but our whole balance of government.

When Mississippi was sued by the Principality of Monaco in 1933, extensive consideration was given to the question of jurisdiction, and a comprehensive opinion was written discussing the rights of the State, and the balance of our constitutional system. 292 U. S. 313.

Point Two.

There Is No Legal Basis for Discussing or Deciding "Paramount Rights, Power and Dominion" in This Case and Paragraph 1 of the Decree Should Be Stricken.

In our Second Petition for Rehearing, pages 7, 8, we pointed out that California had argued to this Court that the United States had no "power or jurisdiction" over the marginal seabed off California and that "the state alone had jurisdiction to regulate" that area; but that in the *California* case this Court had held that the area there

involved could not be "blocked off" or "set apart" for exclusive use by California.

Louisiana, however, has never made any such contention. She has never denied the "paramount rights, power and dominion", the political sovereignty, to the extent that the Constitution confers it, of the United States over the marginal sea within Louisiana's boundaries. Indeed, all that was freely admitted in Louisiana's Answer and argument. We challenge and defy the Solicitor General to produce the slightest indication anywhere that Louisiana has ever "denied" such "paramount authority" of the United States.

As a consequence, there never has been any issue in this case with respect to the "paramount rights, power, and dominion" or the "paramount authority" of the United States over the area in question. There being no such issue, this Court is not empowered by the Constitution to purport to adjudicate it. Yet, when we read this Court's opinion of June 5, 1950, we find a most remarkable and disturbing sentence. We find the Court suddenly stating, like a bolt out of the blue, that "The question here * * * is the power of a State to deny the paramount authority which the United States seeks to assert over the area in question". That statement is sheer error—wholly unfounded, utterly without basis, and contrary to the pleadings. It seeks to inject a wholly non-existent issue. And the further language in the Court's opinion to the effect that protection and control of the marginal sea are functions of national external sovereignty; that the marginal sea is a national, not a State concern; and that national rights must therefore be paramount in that area, are wholly irrelevant to this litigation. They have the effect of setting up a straw man which can be easily demolished, but who never existed in real life.

This Court, therefore, is not empowered to make a decision or to render a decree with respect to the "paramount rights, power and dominion" of the United States over the

marginal sea, for that subject is not in controversy. Accordingly, Paragraph 1 of the decree is wholly improper and should be stricken out.

Point Three.

In Now Stating That Louisiana Does Not Have Fee Simple Title to the Area Involved and in Entering the Balance of the Decree, Without a Trial of the Issue of Fee Simple Title or Giving Louisiana Her Day in Court, This Court Has Committed Serious Error, Amounting to Confiscation by Judicial Decree.

From April 8, 1812 to December 11, 1950, the Sovereign State of Louisiana had fee simple title to and physical possession and control of the marginal seabed within its boundaries. And, unlike California, during the intervening decades Louisiana and her lessees have been taking sand, gravel, shell and shellfish, and more recently oil, out of that marginal seabed. Louisiana's rights to do so were clearly established and nobody disputed it for 136 years. It long since became routine and standard practice, and Louisiana can prove it, if given a chance.

Moreover, so far as fee simple title is concerned, it has been settled law for more than a century that the contiguous States have fee simple title to lands under navigable waters, and Louisiana's marginal seabed is very definitely land under navigable waters.

As was said in the classic case of *Martin* v. *Waddell* (1842), 16 Pet. 367,

> "For when the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." (p. 410).
>
> "At common law, the title and the dominion in lands flowed by the tide were in the king for the benefit of the nation. Upon the settlement of the colonies, like

> rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states, within their respective borders." *Shively* v. *Bowlby*, 152 U. S. 1.

By the Treaty of Independence with the British Crown in April, 1783, the British Crown relinquished to the 13 Original States by name "all claims to the government, proprietary and territorial rights of the same, and every part thereof"; and fixed the boundary of the coastal states into the Atlantic Ocean; "comprehending all islands within twenty leagues of any part of the shores of the United States."

To secure the rights of the Original States under this Treaty, it was made the supreme law of the land by Article VI, Clause 2, of the Constitution. (69th Congress, 1st Session; H. D. No. 398, p. 618)

The Articles of Confederation, Article IX, provided that:

> "No state shall be deprived of territory for the benefit of the United States."

In *Harcourt* v. *Gaillord*, 12 Wheat. 523 (1827), the U. S. Supreme Court held:

> "There was no territory within the United States that was claimed in any other right than that of some one of the Confederate States; therefore, there could be no acquisition of territory made by the United States distinct from, or independent of some one of the states."

Later, this Court held:

> "When the Revolution took place the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Martin* v. *Waddell*, 16 Peters (41 U. S.) 367, (1842).

In *Pollard* v. *Hagen* (1845), 3 How. 212, this Court held that:

> "whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders and they, and the original states, will be upon an equal footing in all respects whatever."
>
> "By the preceding course of reasoning we have arrived at these general conclusions: First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States but were reserved to the states respectively; Secondly, the new States have the same rights, sovereignty and jurisdiction over this subject as the original States."

And, again, this Court held in *Mumford* v. *Wardwell*, (1867), 6 Wall. 423, 436, that:

> "Settled rule of law in this Court is, that the shores of navigable waters and the soils under the same in the original States were not granted by the Constitution to the United States, but were reserved to the several states and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders."

And, again, this Court held in *McCready* v. *Virginia*, (1876) 94 U. S. 391, that:

> "The principle has long been settled in this court, that each State owns the beds of all tidewaters within its jurisdiction, unless they have been granted away. In like manner, the States own the tidewaters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its People, and the ownership is that of the People in their united sovereignty. Citing *Martin* v. *Waddell*, (1842), *supra*. The title thus held is subject to the *paramount right of navigation*, the regulation of which in respect to foreign and interstate commerce, has been granted to the United States. *There has been, however, no such grant of power over the fisheries.*

> These remain under the exclusive control of the State. . . . The right which the People of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is in fact, a property right, and not a mere privilege or immunity of citizenship."

And, again, this Court held in *Illinois Central R. Co.* v. *Illinois*, (1892), 146 U. S. 435:

> "It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. *Pollard* v. *Hagan*, 44 U. S. 3 How. 212 (11:565); *Weyer* v. *Board of State Harbor Comrs.*, 85 U. S. 18 Wall. 57 (21:798).
>
> "The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce with different states and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes."

And in *Scott* v. *Lattig*, 227 U. S. 229, 242-243 (1913), this Court again held:

". . . Besides, it was settled long ago by this court, *upon a consideration of the relative rights and powers of the Federal and state governments under the Constitution*, that lands underlying *navigable waters within the several States* belong to the respective States in virtue of their sovereignty and may be used and disposed of as they may direct, *subject always to the rights of the public* in such waters *and* to the *paramount power* of Congress to control their navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations, and that each new State, upon its admission to the Union, becomes endowed with the same rights and powers in this regard as the older ones. (Citing other cases)

Hale, in *de Jure Maris*, relied on in *Martin* v. *Waddell*, and a host of subsequent, powerful cases have all reaffirmed the same rule—that the States have fee simple title to lands under navigable waters within their boundaries. So far as *fee simple title* is concerned, there never was any "inland water" rule. The rule described concerned "soils" or "land under navigable waters", and as Hale points out, started with the sea and branched inland.

So, in the Old English common law, the rule that fee simple title to lands under navigable waters was vested in the King, started with the sea itself. See Digges (1568 or 1569) *"Arguments Proving the Queenes Maties Propertye in the Sea Landes and Salt Shores thereof"*, quoted in appendices to California's Brief, p. 39; and *The Case of the Royal Fishery of the River Banne* (1610), Dav. 55, 80 Eng. Rep. 540.

In the *River Banne* case, the Court relied upon the Crown's title ~~to the seabed as the~~ basis for holding that the Crown also owned the beds of navigable rivers branching off from the sea, saying:

"The reason for which the king hath an interest in such navigable river, so high as the sea flows and ebbs in it, is, because such river participates of the nature of the sea, and is said to be a branch of the sea so far as it

> flows; 22 Ass. p. 93, 8 Ed. 2, Fitz. Coron. 399, and the sea is not only under the dominion of the king (as is said 6 R. 2, Fitz. Protect. 46. *The sea is of the ligeance of the king as of his Crown of England*; but it is also his proper inheritance; and therefore the king shall have the land which is gained out of the sea, Dyer 15 Eliz. 226, b. 22 Ass. p. 93 . . . . And that the King hath the same prerogative and interest in the branches of the sea and navigable rivers, so high as the sea flows and ebbs in them, which he hath in alto mari, is manifest by several authorities and records." (Emphasis the Court's.)

Louisiana's Answer, therefore, set up Affirmative Defenses establishing her century-old fee simple title and rights to possession. Her First Affirmative Defense set up her chain of title; and her Second Affirmative Defense (which was not at all accurately summarized in this Court's opinion herein) set up title by Prescription, using the very language of Oppenheim's Classic work on International Law describing that principle.

The question of who has fee simple title to real estate is a triable question of fact. See Louisiana's Second Petition for Rehearing (on Proposed Decree), pages 5, 6. **But this Court refused to let Louisiana offer evidence of her fee simple title, and of her undisputed physical possession and control and her exercise of sovereignty over the marginal seabed since 1812,** which are of such long standing as clearly to establish title by Prescription. *Arkansas* v. *Tennessee*, (1940) 310 U. S. 563, 570-1. **Louisiana has never had her day in court.**

This Court in its opinion never even discussed the subject of title. Indeed, it specifically eliminated the issue of fee simple title, and then in the Decree proposed by the United States, the Solicitor General did not even dare to suggest that fee simple title could be vested in the United States. He there abandoned the very claim to fee simple title which he had made in his complaint. See Louisiana's

Reply on Proposed Decree, Pages 2, 3. All these things were perfectly consistent.

Now, however, like a bombshell out of nowhere, comes the decree of December 11, 1950, with the startling statement that Louisiana "has no title . . . or property interest" in the marginal seabed. And, the Decree does not state that the United States has any title or property interest therein.

What can be the basis of such a decree? If the foregoing is correct, there is no basis whatever. It is sheer confiscation. Moreover, unless fee simple title and property interests are to be arbitrarily transferred, without a trial but subtly and by indirection, it seems plain also that nobody now has fee simple title in or property rights to the marginal seabed. For this honorable Court now says Louisiana does not have such rights; but it does not say that the United States has them.

Point Four.

This Court Has No Right or Authority to Attach Powers of Confiscation of Property to "Paramount Rights, Dominion and Powers" of the United States.

As far back as in 1819, this Court through Chief Justice Marshall, in *McCullough* v. *Maryland*, 4 Wheat. at 403, held that:

> "If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action."

Such paramount power and dominion of the government in this case was not questioned by the State of Louisiana. As the Court stated, it was not questioned in *Illinois Central R. Co.* v. *Illinois, supra*, and other cases there cited.

However, if fee simple title and property rights can be freely transferred as some mysterious incident of the "paramount rights, dominion and power", that is, the political

sovereignty, of the United States, then the day of private rights, indeed of free enterprise, is gone. Then private property of any state or of any individual can be summarily confiscated, without a trial, through the device of mere verbal assertion by the United States of its constitutional powers.

The decree of December 11, 1950, is utterly without precedent in the tradition of Anglo-Saxon jurisprudence. It completely denies that trial or "fair hearing" which is the prime requisite of Procedural Due Process. It is sheer confiscation by judicial decree. Indeed, if such a decision arbitrarily transferring property had been made by an administrative agency or lower court, we have no doubt that this honorable Court would reverse it in a twinkling. Unless different considerations are to prevail here, the decree should be vacated and the cause restored to the docket for reargument.

Point Four.

In Any Event, No Accounting Should Be Ordered for the Period Prior to the Date of Decree, December 11, 1950.

Passing over the unsupportable character of the decree as a whole, and assuming that it is this Court's purpose to take title from Louisiana, no accounting should be ordered for the period prior to the date of decree, December 11, 1950, for the following reasons:

A. *Rights established by courts are established by judgment or decree, not opinion.*

A judgment or decree, not the opinion, constitutes the "judicial determination" or "adjudication" of a Court. 49 C. J. S. 25, 26, "Judgments", Section 1. *Samuel Goldwyn, Inc.* v. *United Artists Corp.* (CCA Del.) 113 F. (2d) 703, 706. "A judgment is the judicial act of a court by which it accomplishes the purpose of its creation". 49 C. J. S. 26, "Judgments", Section 2.

Moreover, "A judgment generally takes effect on the rights and titles of the parties to the action as they exist

at the time of the rendition of the judgment", 49 C. J. S. 876, Section 446, "Judgments".

And the opinion of a court is not a judgment or decree. It does not create rights. It does not have the definitive character of a judgment. 49 C. J. S. "Judgments", Section 4. "The rights of the parties are adjudged * * * solely by the decretal portion of the decree". *McGhee v. Leitner* (D. C. Wis. 1941) 41 F. Supp. 674, 676.

B. *Moreover, this Court did not even discuss the subject of fee simple title and property rights prior to December 11, 1950.* Its opinion herein of June 5, 1950 simply said "the issue in this case of litigation does not turn on title or ownership in the conventional sense". If that sentence did not mean that this honorable Court thereby specifically eliminated the issue of title from the case, why, indeed, was the statement made? Now, reversing itself, however, on December 11th, this Court entered a decree which suddenly states that "The State of Louisiana has no title thereto or property interest therein".

December 11, 1950, therefore, is the first day on which this Court had anything to say on the subject of fee simple title and property rights. If this honorable Court is going to take her century-old title away from Louisiana, it certainly did not express that purpose prior to December 11, 1950. Since the whole subject of accounting depends, among other things, basically upon fee simple title and proprietary rights, there can be no possible basis for an accounting for any period prior to December 11, 1950.

The United States waited from 1812 to 1948—136 years—before getting around to bringing this lawsuit. Should Louisiana now not only have her title and property taken away from her without a trial or a day in court, but also be directed to pay money to the United States before a

judgment or decree is entered? We see no basis for such a result.

Respectfully submitted,

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General, State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.

CULLEN R. LISKOW,
Lake Charles, La.
Of Counsel.

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Part II

IN THE

Supreme Court of the United States

October Term, 1950.

No. 12, Original.

UNITED STATES OF AMERICA, *Plaintiff,*

v.

STATE OF LOUISIANA, *Defendant*

PETITION FOR REHEARING FROM DECREE

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
~~F. TROWBRIDGE VOM BAUR~~,
Washington, D. C.

CULLEN R. LISKOW,
Lake Charles, La.
Of Counsel.

SENDKER PRINTING, 841 ALMONASTER AVE., N. O., LA.

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UNITED STATES OF AMERICA, *Plaintiff,*

v.

STATE OF LOUISIANA, *Defendant*

PETITION FOR REHEARING FROM DECREE

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes the State of Louisiana and moves the Court for leave to file a petition for rehearing on the decree rendered herein on December 11, 1950.

The ground of the petition is that a rehearing is appropriate because the nature of the decree is contrary to the opinion of the Court rendered on June 5, 1950 and,

in effect, said decree is unconstitutional, null and void for the reasons hereinafter shown..

I.

This Court Assumed Jurisdiction of This Case Without Right or Authority Under the Constitution

The State of Louisiana, Defendant, originally filed a motion to dismiss the complaint of the United States herein on the ground that this Court does not have original jurisdiction of any controversy between the United States and the State of Louisiana, under Article III, Section 2, Clause 2, or under any other provision of the Constitution of the United States.

In support of its objection, Defendant submitted uncontrovertible authority from the record of the 1787 Constitutional Convention, which wrote the U. S. Constitution and created this Court, and also quoted the formal admission of the United States through its Attorney General in this Court, that this Court did not have original jurisdiction of a controversy between the United States and an individual State.

The record of the Constitutional Convention shows that on June 7, on August 20, on August 22 and on August 30, 1787, proposals were submitted to the Convention to grant this Court original jurisdiction of controversies between the United States and an individual State and that no vote or action was taken on these propositions. (H. Doc. 398, 69th Cong., 1st Session, pp 769, 973, 572, 595, 644; 1 Elliott's Debates pp 177, 180; and the Madison Papers, Vol. 3, pp 1366, 1399, 1465, 1466).

However, on August 30, 1787, when the proposition was lastly submitted to the Convention that claims to territory or other property by the United States or any particular State should be examined into and decided upon by the Supreme Court of the United States, this motion was peremptorily rejected by vote of 8 States against and only 2 States for the motion. (H. Doc. 398, p. 645; 1 Elliott's Debates pp 275, 276)

In **Florida** vs. **Georgia** (1854), How. 478, the United States through its Attorney General sought to intervene in a boundary action between the two States and, upon objection being urged, the Attorney General for the United States formally and of record admitted to this Court that if the United States entered the suit as a party plaintiff that would be to put an end to the suit according to the constitutional doctrine of parties; and, after reviewing the provisions of Clause 2 of Section 2 of Article III of the Constitution, he said:

> **"The court is not empowered by the Constitution to entertain an original suit between the United States and a state, or the United States and two states."**

He added that that was the settled rule of law on jurisdiction.

Further, the record of the Constitutional Convention shows that the Original States were so jealous to preserve their sovereignty against the risk of a mere decree of the United States Supreme Court in a controversy between the United States and any individual State, that the Convention even denied to the Supreme Court original jurisdiction of any controversies to which the United States

should be a party, because the States had granted this Court original jurisdiction in controversies between themselves, and, therefore, did not want to extend the original jurisdiction of this Court to any controversies to which the United States should be a party, regardless of whom the opposing party might be. See Elliott's Debates, Vol. 1, pp 268, 269.

Furthermore, this Court held that it had only such original jurisdiction as is granted by the Constitution. **Chisholm** vs **Georgia,** 2 U. S. 2 (1793); **Marbury** vs **Madison,** 5 U. S. 1, (1803); **Cohen** vs **Virginia,** 19 U. S. 262, (1821), which decisions have been repeatedly reaffirmed. It will be noted that these decisions were handed down by this Court while the work of the Convention, and the public debates on the adoption of the Constitution were fresh in the mind of the Justices, including Chief Justice Marshall, who handed down these decisions of the Court.

True, after more than 100 years elapsed after adoption of the Constitution, or since 1891, this Court, without objection of defendant states, took original jurisdiction of several suits brought by the United States against individual states.

However, the laches on the part of these states neither served to amend the Constitution or to grant this Court original jurisdiction in such cases.

The objection filed by the State of Louisiana to the jurisdiction of this Court is based on solid constitutional grounds and its denial can only be arbitrary and without authority of law. As a matter of fact, the Court, in this case, overruled Louisiana's objection to its jurisdiction without ever assigning any reasons.

We respectfully submit that any judgment or decree rendered by any Court which assumes jurisdiction without any authority under the law, is a nullity and can have no force of law. 31 American Jurisprudence, 409, and numerous cases cited.

II.

Settled Law That States Own Their Navigable Waters and the Soils and Resources Under Them and That These Were Not Granted to the United States

As repeatedly held by this Court:

> "At common law, the title and the dominion in lands flowed by the tide were in the king for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states, within their respective borders." **Shively** v. **Bowlby,** 152 U. S. 1. (Cases cited)

By the Treaty of Independence with the British Crown in April, 1783, the British Crown relinquished to the 13 Original States each by name "all claims to the government, proprietary and territorial rights of the same, and every part thereof"; and fixed the boundary of the coastal states into the Atlantic Ocean, "comprehending all islands within twenty leagues of any part of the shores of the United States."

To secure the rights of the Original States under this Treaty, it was made the supreme law of the land by Article VI, Clause 2 of the Constitution. (69th Congress, 1st

Session; H. D. No. 398, p. 618) and it is our sworn duty to uphold said Treaty as such.

The Articles of Confederation, Article IX provided that,

> "No state shall be deprived of territory for the benefit of the United States."

In **Harcourt** v. **Gaillard,** 12 Wheat. 523 (1827), the U. S. Supreme Court held,

> "There was no territory within the United States that was claimed in any other right than that of some one of the Confederate States; therefore, there could be no acquisition of territory made by the United States distinct from, or independent of some one of the states."

Later, this Court held:

> "When the Revolution took place the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." **Martin** v. **Waddell, 16 Peters** (41 U. S.) 367, (1842).

By special Acts of Cession, the larger Original States, including Virginia, New York and Georgia executed Acts of Cession to the United States of their vacant and unappropriated lands to assist the government in raising revenues to pay the Revolutionary War debt, with the stipulation that after liquidation of said debt the remaining lands would be transferred to States later to be created on an equal footing with the Original States.

In **Pollard** v. **Hagan** (1845), 3 How. 212, this Court held that:

> "whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders and they, and the original states, will be upon an equal footing in all respects whatever."

And this Court further solemnly held in that case that:

> **"By the preceding course of reasoning we have arrived at these general conclusions:** First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States but were reserved to the states respectively; Secondly, the new States have the same rights, sovereignty and jurisdiction over this subject as the original States."

And, again, this Court held in **Memford v. Wardwell,** (1867), 6 Wall. 423, 436, that:

> **"Settled rule of law in this Court** is, that the shores of navigable waters and the soils under the same in the original States were not granted by the Constitution to the United States, but were reserved to the several states and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders."

And, again, this Court held in **McCready** v. **Virginia,** (1876), 94 U. S. 391, that:

> **"The principle has long been settled in this court,** that each State owns the beds of all tidewaters within its jurisdiction, unless they have been

granted away. In like manner, the States own the tidewaters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its People, and the ownership is that of the People in their united sovereignty. Citing **Martin** vs. **Waddell**, (1842), **supra.** The title thus held is subject to the **paramount right of navigation,** the regulation of which in respect to foreign and interstate commerce, has been granted to the United States. **There has been, however, no such grant of power over the fisheries.** These remain under the exclusive control of the State. . . . **The right which the People of the State thus acquire** comes not from their citizenship alone, but from their citizenship and property combined. It **is in fact, a property right,** and not a mere privilege or immunity of citizenship."

And, again, this Court held in **Illinois Central R. Co.** v. **Illinois,** (1892), 146 U. S. 435; while citing numerous other cases, that:

> **"It is the settled law of this country** that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. **Pollard** v. **Hagan,** 44 U. S. 3 How. 212 (11: 563); **Weber** v. **Board of State Harbor Comrs.**, 85 U. S. 18 Wall. 57 (21:798).

"**The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes** over which is conducted an extended commerce with different states and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes."

And in **Scott** v. **Lattig,** 227 U. S. 229, 242-243 (1913), this Court again held:

". . . Besides, **it was settled long ago by this court, upon a consideration of the relative rights and powers of the Federal and state governments under the Constitution,** that lands underlying navigable waters within the several States belong to the respective States in virtue of their sovereignty and may be used and disposed of as they may direct, subject always to the rights of the public in such waters and to the **paramount power** of Congress to control their navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations, and that each new State, upon its admission to the Union, becomes endowed with the same rights and powers in this regard as the older ones.
(citing other cases)

III

This Court Has No Right or Authority to Attach Powers of Confiscation of Property to Paramount Powers of the United States, Not Even in Issue

As far back as in 1819, this Court through Chief Justice Marshall, in **McCullough** v. **Maryland**, 4 Wheat. at 403, held that:

> "If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action."

Such Constitutional paramount power and dominion of the government was not questioned by the State of Louisiana. No such issue was involved here, and no decree of the Court was necessary on the question of the "Constitutional" paramount power and dominion of the United States. As the Court stated, it was not questioned in **Illinois Central R. Co.** v **Illinois**, supra, and other cases there cited.

But, for the first time in the history of this country, the foreign ideology of confiscation and nationalization of property traveling hand in hand with the paramount power and dominion of the federal government, is sought to be applied in these tideland cases without regard to the original and constitutional rights of the states, or the people of the states in their collective sovereign capacity to the ownership of their property.

Thus, contrary to the historical facts of record and the settled law of the land, this Court stated in the California decision:

"Neither the English Charters granted to this nation's settlers, nor the Treaty of Peace with England, nor any other document to which we have been referred, showed a purpose to set apart a three-mile ocean belt for colonial or state ownership."

The Court there sought to nullify the Treaty of Independence, the Supreme Law of the Land, and initiated the theory of confiscation and nationalization by stating further that:

"The United States here asserts rights in two capacities transcending those of a **mere property owner.**"

And, again, ignoring the property rights of the original states and all other states of the Union, this Court in this case stated that:

"Louisiana prior to admission had no stronger claim to ownership of the marginal sea than the original 13 colonies or California had."

IV.

Confiscation by Decree Without Trial

So here we see the Court deciding the question of sovereignty ownership against the original 13 states after their undisputed title and peaceful possession since the treaty of 1783 without their being parties to this suit, and without a hearing or trial, just as the Court denied the State of Louisiana a trial on the question of title, all in violation of the fundamental principle of due process of law. In fact the Court said:

"The issue in this class of litigation does not turn on title or ownership in the conventional sense."

Nonetheless, after stating flatly, in its decision on June 5, 1950, that title was not an issue in this case, this Court included the following edict in its decree of December 11, 1950:

> "The State of Louisiana has no title thereto or property interest therein."

Therefore, without a trial and by the arbitrary application of unconstitutional power ideology, the property of the State of Louisiana, and in fact of every other state in the union, will be confiscated and nationalized by said decree. Further, the Court by its very statement that the paramount power and dominion of the United States transcended tho of a **mere property owner**, most certainly foreshadowed the doom of private property ownership in these United States, any time those in power in the Federal Government choose to extend nationalization and socialization through unlawful decrees which cannot be resisted ordinarily, but which should be corrected by the Court, itself, while there is yet time to do so.

V.

Court's Order for Accounting Admits Confiscatory Effect of Its Decree

That this Court ordered the State of Louisiana to render an accounting from date of its decision, June, 1950, shows that the alleged confiscatory paramount power, dominion and right of the federal government was created by the Court only as of that time.

It is inescapable that when the Attorney General and Solicitor General for the United States suggested in their

proposed form of decree that the State of Louisiana be required to render an accounting to the United States under the decision of this case from June, 1947, the time of the California decision, that they realized full well that the confiscation and nationalization of state property originated with the decision in the California Case.

Likewise, when this Court rendered its decree ordering the State of Louisiana to render accounting to the United States for all monies collected from mineral leases or from oil royalties, etc. from its tidelands from June, 1950, date of the decision in this case, the Court also manifested its realization that the United States did not have any so-called paramount dominion and right to control the taking of the oil and other minerals from Louisiana's tideland property within her boundaries or to secure the revenues therefrom until this Court purported to create such unlawful paramount dominion and confiscatory right in the United States by its decision.

We submit with all due respect that this Court has no constitutional power or right to create in the United States any such confiscatory or nationalization power and dominion over "mere property owners"—be they a sovereign state or an ordinary private individual.

The Constitution provides for condemnation or expropriation of property **only** upon payment of just compensation.

We, therefore, respectfully submit to this Court that its constitutionally unauthorized assumption of jurisdictional authority in this case be recognized and that its decision and decree creating an unlawful paramount power

and dominion and right of confiscation and nationalization of Louisiana's tideland be recalled and set aside.

Wherefore, the State of Louisiana moves that leave be granted to file this petition for rehearing on the decree rendered herein and that said decree be recalled and set aside, or that the case be restored to the docket for argument, after which this petition be granted, and the decision and decree previously rendered herein be reversed and the complaint dismissed, or that, in the alternative, the case be fixed for trial, in accordance with law and the Constitution, with full opportunity for the State of Louisiana, defendant, to submit its evidence of title, and for judgment as prayed in its motion to dismiss for lack of jurisdiction and in its answer, [redacted] all in accordance with the Constitution and Laws of the United States.

Respectfully submitted,

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney, General,
State of Louisiana.

L. H. PEREZ,
New Orleans, La.

BAILEY WALSH,
F. TROWBRIDGE VOM BAUR,
Washington, D. C.

CULLEN R. LISKOW,
Lake Charles, La.
Of Counsel.

I hereby certify that the within Petition for Rehearing is believed to be meritorious and is well founded in fact and in law, and that it is presented in good faith and not for delay.

BOLIVAR E. KEMP, JR.,
Attorney General,
State of Louisiana.

January 25, 1951.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA

MOTION FOR MODIFICATION OF DECREE AND BRIEF IN SUPPORT OF MOTION

HERBERT BROWNELL, JR.,
Attorney General.

SIMON E. SOBELOFF,
Solicitor General.

J. LEE RANKIN,
Assistant Attorney General.

OSCAR H. DAVIS,
JOSEPH F. DAVIS,
Special Assistants to the Attorney General.

GEORGE S. SWARTZ,
Special Attorney.

Department of Justice, Washington, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 7, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA

MOTION FOR MODIFICATION OF DECREE

This Court having entered its decree in this cause on December 11, 1950, declaring the United States to be entitled to the submerged lands and resources of the Gulf of Mexico extending seaward twenty-seven marine miles from the coast of Louisiana, enjoining the State and its grantees from interfering therewith, and requiring the State to account for all sums derived therefrom by it after June 5, 1950; and

The United States, by the Submerged Lands Act of May 22, 1953, having relinquished to the several States the lands and resources under navigable waters within their boundaries as those boundaries existed when the States entered the Union, or as since approved by Congress, and all

money claims arising out of operations in such areas; and

It appearing that the Submerged Lands Act necessitates a modification of the decree and injunction now in effect in this cause, to relieve the State of so much thereof as relates to the rights relinquished by the Submerged Lands Act, and necessitates as a part of such modification the determination and location by this Court of the state boundary delimiting the relinquished area; and

It appearing that Congress in enacting that statute did not intend to, and did not, approve or adopt any particular location of the boundary of Louisiana as there referred to, or make any change in that boundary, but intended and contemplated that this Court should determine and locate the boundary of Louisiana, according to the law and the facts, as it existed when the State entered the Union or as later approved by Congress, and intended merely to relinquish the lands and resources lying within the legal boundary as it should be so determined and located; and

It appearing that the seaward boundary of Louisiana at the time it entered the Union was three nautical miles from shore and from the outer limit of inland waters, and it further appearing that the United States, consistently with its long-established support of the principle of

freedom of the seas, has not approved for the State of Louisiana a boundary extending more than three miles from shore and from the outer limit of inland waters:

Now, therefore, the United States of America respectfully moves this Court to ascertain the distance from the coast in the Gulf of Mexico of the boundary of the State of Louisiana as it existed when the State entered the Union or as subsequently approved by Congress, and to modify the decree heretofore entered in this cause on December 11, 1950, so as to exclude from its scope all submerged lands lying landward of that boundary, other than lands excepted from the operation of the Submerged Lands Act by Section 5 of that Act.

HERBERT BROWNELL, JR.,
Attorney General.

SIMON E. SOBELOFF,
Solicitor General.

J. LEE RANKIN,
Assistant Attorney General.

MAY 1955.

343910—55——2

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 7, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA

BRIEF IN SUPPORT OF MOTION FOR MODIFICATION OF DECREE

JURISDICTION

By paragraph 4 of its decree entered herein on December 11, 1950, this Court reserved jurisdiction to enter such further orders as might from time to time be deemed advisable or necessary to give full force and effect to the decree. 340 U. S. 899, 900.

QUESTION PRESENTED

Under the Submerged Lands Act, which relinquished to the several States the lands under navigable waters within their respective boundaries, is the boundary of Louisiana to be considered as located seaward from the coast a distance of three nautical miles, as asserted by the United States, or three leagues, as claimed by Louisiana?

STATUTES INVOLVED

Relevant portions of the following statutes are set out in the Appendix, pages 45–55, *infra:*

Act to enable the people of the Territory of Orleans to form a constitution and state government, etc., approved February 20, 1811, 2 Stat. 641; *infra,* p. 45.

Submerged Lands Act, Public Law 31, 83d Congress, approved May 22, 1953, 67 Stat. 29; *infra,* p. 46.

Act 55 of 1938, approved June 30, 1938, Louisiana Acts 1938, p. 169; *infra,* p. 49.

Louisiana Act 33 of 1954, approved June 21, 1954; *infra,* p. 52.

STATEMENT

By its opinion of June 5, 1950 (*United States* v. *Louisiana,* 339 U. S. 699), and the decree entered on December 11, 1950 (340 U. S. 899), this Court determined that the United States rather than the State was entitled to the lands, minerals and other things underlying the Gulf of Mexico, lying seaward of the ordinary low-water mark on the coast of Louisiana, and outside of the inland waters, extending seaward twenty-seven marine miles and bounded on the east and west, respectively, by the eastern and western boundaries of the State of Louisiana. The Court also held that the United States should have an accounting of all sums derived by the State from that area after June 5, 1950. By the Submerged Lands Act (Public Law

31, 83d Cong., 67 Stat. 29) the United States relinquished to the several States the lands under navigable waters within their respective boundaries, as there defined, and all claims for money or damages arising out of any operations upon or within said lands and waters. It is apparent that the decree in this case should be modified accordingly, to exclude from its scope those submerged lands which lie within the boundary of the State of Louisiana, as defined by the Act, and to relieve the State of the requirement that it account for moneys derived from those lands since June 5, 1950. Such modification, to be effectual, must include a determination of where the state boundary, as referred to in the Submerged Lands Act, is located. Louisiana has taken the position that its boundary is located three leagues from the low-water mark and outer limit of inland waters, the maximum relinquished by Section 2 (b) of the Submerged Lands Act. See Act 55 of 1938, approved June 30, 1938, Louisiana Acts of 1938, p. 169, Appendix, *infra,* p. 49; Louisiana Act 33 of 1954, approved June 21, 1954, Appendix, *infra,* p. 52. The United States takes the position that the boundary of Louisiana is and has always been three geographic miles from the low-water mark and outer limit of inland waters. This motion seeks a resolution of that conflict.

SUMMARY OF ARGUMENT

I

The Submerged Lands Act grants to the several States the lands beneath navigable waters within the boundaries of the respective States, but does not itself determine where those boundaries are located, except to the extent that it limits them, for the purposes of the Act, to three geographical miles from the seacoast or to boundaries existing when the States entered the Union, or later approved by Congress, and extending not more than three miles into the Atlantic or Pacific or three leagues into the Gulf of Mexico. The purpose of the Act neither to change the location of the state boundaries nor to accept any particular contention regarding their location appears both from the language of the Act and from the congressional debates on it. Therefore, to determine the extent of the grant made to Louisiana by the Submerged Lands Act, this Court must make an extrinsic determination of where the boundary of Louisiana was and is located in the Gulf of Mexico.

II

1. Louisiana's claim to a marginal belt of three leagues in the Gulf of Mexico rests on the terms of the State's Enabling Act, which described the State to be formed as "including all islands within three leagues of the coast." However, that language does not appear on its face to mean "in-

cluding all water within three leagues of the coast", and similar language used in other territorial descriptions has not been so construed. Such language has commonly been understood to be merely a convenient method of identifying islands, and should be so construed here.

2. This construction conforms to the settled policy of the United States, which from its earliest beginnings has firmly and consistently adhered to the policy of limiting to three miles its own claims of territorial waters, and of recognizing no greater claims by other nations, as part of the doctrine of freedom of the seas.

III

In political questions, and particularly in matters of foreign affairs, the courts follow the determinations formally and officially made by the political branches of the Government, legislative or executive, to which such matters are entrusted under our form of government. The extent to which the United States has asserted jurisdiction over the seas adjoining its shores is such a question. The political branches of the Government have clearly and consistently, during the periods in question and thereafter, fixed three miles as the limit of American jurisdiction over its bordering ocean waters which is controlling as to the coast of Louisiana. This Court should follow and give effect to that determination.

ARGUMENT

I. THE SUBMERGED LANDS ACT GRANTED TO LOUISIANA THE SUBMERGED LANDS WITHIN ITS BOUNDARY BUT DID NOT DETERMINE THE LOCATION OF THAT BOUNDARY

A. ON ITS FACE, THE ACT NEITHER CHANGES NOR DECLARES THE LOCATION OF THE LOUISIANA BOUNDARY

Section 3 of the Submerged Lands Act grants to the several States the "lands beneath navigable waters within the boundaries of the respective States." 67 Stat. 30; Appendix, *infra*, p. 47 "Boundaries" are defined by Section 2 (b):

> The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 4 hereof but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico.

67 Stat. 29; Appendix, *infra*, p. 47.

Section 4 of the Submerged Lands Act confirms the seaward boundaries of the original States as three miles from the coast, and approves past or

future extensions to the same distance by other States. It then provides,

> Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

67 Stat. 31; Appendix, *infra*, p. 48.

It is thus apparent that the Act does not change the location of the State boundary. The submerged lands granted to the State, as defined by Section 2 (b), are those lying within the boundary as it existed when the State entered the Union, or as since approved by Congress, not extending, however, more than three leagues into the Gulf of Mexico. Neither does the Act express any opinion as to the location of the boundary. Boundaries claimed to lie more than three miles from the coast are not among those "approved and confirmed" by Section 4, but on the other hand that section provides that it is not to be construed as "questioning or in any manner prejudicing" such boundaries. The Court, then, must look beyond the face of the Act to discover the scope of the grant made by it.

B. THE LEGISLATIVE HISTORY OF THE ACT SHOWS THAT CONGRESS INTENDED NEITHER TO CHANGE NOR TO DECLARE THE LOCATION OF THE BOUNDARIES OF ANY STATE

The apparent meaning of the Submerged Lands Act in this respect, as discussed above, is amply supported by the legislative history of the Act.

Throughout the debates in the Senate, where the Act in its present form originated,[1] it was repeatedly pointed out that the bill did not in any way approve or disapprove the claim of any Gulf State to three leagues, but rather left that question wholly at large and subject to future determination to the same extent as if the Act had not been passed.

This point, that the Act neither endorsed nor prejudiced the claims of the Gulf States, but left them free to make what proof they could as to their boundary locations, was particularly emphasized by Senator Cordon, acting chairman of the Senate Committee on Interior and Insular Affairs, who explained the bill to the Senate when it was reported out by that committee; and many others made statements to the same effect. The following excerpts from the debates are typical:

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[1] As passed, the Act is designated as H. R. 4198, 83d Congress. However, the language of the original House bill was replaced by a Senate amendment, which substituted, with only minor changes, the provisions of S. J. Res. 13 as reported by the Committee on Interior and Insular Affairs. See S. Rept. No. 133, 83d Cong., 1st Sess., pp. 2–5; 99 Cong. Rec. 4487–4488 (1953).

> Mr. CORDON. * * * The States of the United States have legal boundaries. It is not a part of the power or the duty of Congress to make determination with reference to those boundaries, or where those boundaries should lie. It is a matter for the courts to determine, or for the United States, through Congress and the legislative organizations of the several States, to reach an agreement upon. The pending bill does not seek to invade either province. It leaves both exactly where it finds them. Whenever a question arises as to a boundary, it will be determined exactly as any question in law is determined, and the boundary will be established.
>
> The pending measure does not seek to prejudge that issue, or to determine it. [99 Cong. Rec. 2620.][2]

Senator Holland of Florida, who was the author of S. J. Res. 13,[3] also stated categorically that it was not the purpose of the Act to determine the location of any State boundary:

> Mr. HOLLAND. * * * If it were proposed by the pending measure to extend the line beyond the 3 geographical miles, the Senator from Illinois [Mr. Douglas] would be justified in having concern. The real fact is that the joint resolution does not make any such proposal. It merely provides with complete clarity that no State which

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[2] See also 99 Cong. Rec. pp. 2621, 2632, 2633, 2694, 2696, 2699, 2755, 2756–57, 2896, 2916, 2923, 2933, 2975, 3035, 3037.

[3] See Footnote 1, *supra*.

> claims to have had a constitutional boundary going beyond 3 geographic miles at the time it was admitted to the Union, or claims to have a boundary that goes beyond that distance, and has been approved by the Congress since the time of its admission to the Union, will have those claimed rights affected in any way by this joint resolution. * * *
>
> * * * * * *
>
> * * * all that is done under this measure, by means of the only provisions of it that apply to this question, is to preserve in status quo the exact rights, whatever they may be, of the State of Florida and, likewise, of the State of Texas or any other State to be heard upon this question.
>
> The action taken by Congress in approving the so-called Holland joint resolution and this particular provision of it does not in itself operate to extend any boundaries for Florida, Texas, or any other State beyond the 3-geographic-mile limit. It simply preserves in status quo the rights of any States which may claim to bring themselves under this provision of the joint resolution. [99 Cong, Rec. 2621–2622.]

Senator Long of Louisiana concurred in this construction in language which prophesied the issue now pending before the Court:

> Mr. LONG. * * * I submit to the Senator that the State of Louisiana has a right under the joint resolution only to establish what its boundary is and what its bound-

ary has always been from the time it entered the Union, and that Florida and Texas have that right. The pending measure does not give to Texas, Florida, or Louisiana anything more than a boundary 3 miles out. It merely gives them the right to prove, if prove they can, that the boundary goes beyond 3 miles. [99 Cong. Rec. 2896.]

Significantly, Senators from both California and Texas, States benefiting from the Submerged Lands Act, were of the same opinion:

Mr. KUCHEL. * * * One other question which has arisen in these debates is the California boundary statute adopted by my State in 1949. * * *

* * * * *

The point here, however, is that the pending joint resolution has no effect on the 1949 act. It neither validates nor invalidates it. The effect of this act of the State of California awaits judicial determination. California, like every other State, will have an equal opportunity to establish the location of its own coastline and historic boundary. This is the basic, underlying equity of the resolution. [99 Cong. Rec. 2985.]

* * * * *

Mr. DANIEL. The joint resolution does not undertake to fix the historic boundaries of any State, but it limits them all to the

boundaries as they existed at the time each State entered the Union. [99 Cong. Rec. 2976.]

* * * * *

I may say to the distinguished Senator from New Mexico that I do not know of any fairer way to treat all the States than to confirm their titles to the lands that were beneath the navigable waters within their boundaries at the time they entered the Union. Those are the words used, or "as heretofore approved by the Congress of the United States." When we do that, we are not fixing new boundaries, and we are not changing any boundaries. The boundaries would stand as they have always stood.

They must have existed at the time Texas entered the Union at 3 leagues in the gulf, or this measure will not restore the proprietary rights to that distance; and Florida's boundaries must have been heretofore approved by Congress not hereby approved, but heretofore approved, or Florida would not receive lands under this bill to that distance. [99 Cong. Rec. 4174–4175.]

In the light of the foregoing there is no room for doubt that by the Submerged Lands Act Congress did not purport to grant to Louisiana the submerged lands to any particular distance from the shore, but rather granted such lands within the actual boundary of the State, wherever it

might be located, as it existed for purposes of ordinary political jurisdiction when the State entered the Union or as thereafter approved by Congress (but not over three leagues in any event). As the Senate debate unequivocally recognized, a mere *claim* to three leagues would not be enough; the decisive factor is the actual legal boundary and not the State's claim or demand. Accordingly, it is necessary to ascertain the actual political boundary of Louisiana when it became a State to fix the scope of the grant.

II. THE GULFWARD BOUNDARY OF LOUISIANA WAS AND IS THREE MILES FROM THE LOW-WATER MARK AND OUTER LIMIT OF INLAND WATERS

A. LOUISIANA'S ENABLING ACT DID NOT PURPORT TO GIVE THE STATE A MARGINAL BELT OF THREE LEAGUES

The Louisiana Enabling Act described the new State to be formed as "including all islands within three leagues of the coast." Act of February 20, 1811, 2 Stat. 641; Appendix, *infra*, p. 45. The Act of Admission repeated the same description. Act of April 8, 1812, 2 Stat. 701. That provision, that the State should include all *islands* within three leagues of the coast, is construed by the State as meaning that it was to include all *waters* and *submerged* lands within that distance. Thus, Act 55 of 1938, approved June 30, 1938, by which the State of Louisiana purported to extend its maritime boundary to a line twenty-seven

miles from shore, contains among its preliminary recitals the following:

> Whereas, by the Act of Congress of February 20th, 1811, by which the State of Louisiana was admitted to the United States as a State, the southern boundary of Louisiana was fixed as follows: "thence bounded by the said gulf to the place of beginning, including all islands within three leagues of the coast;"
>
> Whereas, therefore, the gulfward boundary of Louisiana is already located in the Gulf of Mexico three leagues distant from the shore * * *.

La. Acts, 1938, p. 169; Appendix, *infra*, p. 50.[4] The substance of Section 1 of that Act, codified as Section 1 of Title 49, Louisiana Revised Statutes of 1950, has now been amended by Act 33 of 1954, approved June 21, 1954, which recites that "the United States Congress admitted Louisiana as a State into the Union in April, 1812, and

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[4] It is unnecessary here to consider the affirmative provisions of that act, purporting to extend the boundary of the State into the Gulf twenty-seven miles from shore. It is not contended that that enactment has been approved by Congress. The grant made by the Submerged Lands Act does not extend to boundaries more than three miles from shore, unless such greater boundaries existed when the State entered the Union, or have since been approved by Congress, and in any event does not extend beyond three leagues into the Gulf of Mexico. Secs. 2 (b), 4, Appendix, *infra*, pp. 47, 48. Act 33 of 1954 has again reduced the State's claim to three leagues. Appendix, *infra*, p. 52.

fixed its gulfward boundary at 3 leagues from coast." Appendix, *infra*, p. 52. The same contention was made by the State before this Court in *Louisiana* v. *Mississippi*, 202 U. S. 1, 22, where counsel, referring to the Enabling Act, said, "The act grants all islands within three leagues of the coast and Louisiana therefore owns the islands and waters lying north of the St. Bernard peninsula and within nine miles from its coast." The Court found it unnecessary to deal with that contention under the circumstances of that case. 202 U. S. at 52.

It is submitted that there can be no justification for construing the boundary described in the Enabling Act as including three leagues of water and submerged land. On its face, "including all islands within three leagues of the coast" does not appear to mean "including all waters and submerged lands within three leagues of the coast," and similar language in other boundary descriptions has not been so construed. For example, the Treaty of Paris of September 3, 1783, by which Great Britain recognized the independence of the United States, after describing the landward boundary of the United States, from the mouth of the St. Croix river in the Bay of Fundy to the mouth of the St. Mary's river between Georgia and Florida, added:

> comprehending all islands within twenty leagues of any part of the shores of the United States, and lying between lines to

> be drawn due east from the points where the aforesaid boundaries between Nova-Scotia on the one part, and East-Florida on the other, shall respectively touch the Bay of Fundy and the Atlantic ocean; excepting such islands as now are, or heretofore have been within the limits of the said province of Nova Scotia.

8 Stat. 80, 82. That has never been understood as meaning that the boundary of the United States was a line twenty leagues from shore in the sea; on the contrary, the United States has consistently taken the position that its boundary in the sea is three nautical miles, or one league, from the shore.[6]

Similarly, the Treaty of March 18/30, 1867, by which Russia ceded Alaska to the United States, described the ceded area as:

> all the territory and dominion now possessed by his said Majesty on the continent of America and in the adjacent islands, the same being contained within the geographical limits herein set forth, to wit:
> * * *
>
> The western limit within which the territory and dominion conveyed, are contained, passes through a point in Behring's straits * * * and proceeds due north, without limitation, into the same Frozen ocean. The same western limit, beginning at the same initial point, proceeds thence

[6] This point is developed in detail, *infra*, pp. 23–35.

> in a course nearly southwest through Behring's straits and Behring's sea, so as to pass midway between the northwest point of the island of St. Lawrence and the southeast point of Cape Choukotski, to the meridian of one hundred and seventy-two west longitude; thence, from the intersection of that meridian, in a southwesterly direction, so as to pass midway between the island of Attou and the Copper island of the Kormandorski couplet or group in the North Pacific ocean, to the meridian of one hundred and ninety-three degrees west longitude, so as to include in the territory conveyed the whole of the Aleutian islands east of that meridian.

15 Stat. 539. In the Bering Sea Fur Seal Arbitration between the United States and Great Britain, the United States conceded that the foregoing provisions only served to identify the islands conveyed, and were not a conveyance of the water area within the described line. XII *Fur Seal Arbitration. Proceedings of the Tribunal of Arbitration at Paris, 1893.* Oral Argument for the United States, 107–110. To the same effect was the statement made by Mr. Peirce, the American delegate at the arbitration of the whaling and sealing claim of the United States against Russia, held at the Hague in 1902. He there said:

> In the first session the arbitrator asked me, "What is the extent of jurisdiction which the United States claim to-day in

> Bering Sea?" and I replied that the American Government now claims an extent of 3 miles. I wished that this reply might be sustained by the Secretary of State, Mr. John Hay. I am now in receipt of a dispatch, and in accordance with the authority which I have received from the Secretary of State of the United States, dated July 3, 1902; I repeat that the Government of the United States claims, neither in Bering Sea nor in its other bordering waters, an extent of jurisdiction greater than a marine league from its shores, but bases its claims to jurisdiction upon the following principle: The Government of the United States claims and admits the jurisdiction of any State over its territorial waters only to the extent of a marine league, unless a different rule is fixed by treaty between two States; even then the treaty States alone are affected by the agreement:

Foreign Relations of the United States, 1902, Appendix I, 440.

It is submitted there is neither reason nor authority for construing the language of the Louisiana Enabling Act as meaning other than what it says: that islands located within three leagues of the coast are part of the State of Louisiana.

B. IT WOULD HAVE BEEN INCONSISTENT WITH THE POLICY OF THE UNITED STATES EVER SINCE 1793, IN FURTHERANCE OF THE PRINCIPLE OF FREEDOM OF THE SEAS, TO HAVE CLAIMED FOR LOUISIANA MORE THAN THREE MILES OF MARGINAL SEA

As has been shown, the Louisiana Enabling Act clearly established the southern boundary of Louisiana as the Gulf of Mexico, the boundary description being "to the Gulf of Mexico; thence *bounded by the said Gulf* to the place of beginning;" that is, to the "*mouth of the river Sabine.*" [Emphasis supplied.] However, the State of Louisiana asserts that the language "including all islands within three leagues of the coast" should be construed as meaning a marginal belt of three leagues. We shall now show that such a construction is contrary to the foreign policy of the Federal Government which had been, was and is to limit its marginal belt and external boundary to three miles in the Gulf of Mexico as well as on its other coasts. There was no provision in the constitution or laws of Louisiana prior to or at the time it became a member of the Union purporting to be contrary to such foreign policy of the Federal Government, nor was any action by Congress theretofore taken to extend Louisiana's seaward boundary beyond three geographical miles. Such foreign policy in the circumstances of this case is conclusive as to the location of Louisiana's seaward boundary.

The concept of a marginal belt of territorial water, subject to the jurisdiction of a coastal nation, is an encroachment upon the general

principle of freedom of the seas. When Louisiana became a State in 1812, the policy of the United States was already well settled to claim jurisdiction over no more than three miles of marginal sea and to recognize no greater claims by other nations. This policy had its beginning in the administration of George Washington, when Thomas Jefferson, then Secretary of State, on November 8, 1793, wrote to George Hammond, the British minister, and to Edmond Genet, the French minister:

> The character of our coast, remarkable in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us, in reason, to as broad a margin of protected navigation as any nation whatever. Reserving, however, the ultimate extent of this for future deliberation, the President gives instructions to the officers acting under his authority, to consider those heretofore given them as restrained for the present to the distance of one sea-league or three geographical miles from the seashores.

Letter to Mr. Hammond, 16 H. Exec. Docs., 42d Cong., 2d Sess., No. 324, p. 553; Letter to Mr. Genet, American State Papers, I Foreign Relations, p. 183.

On September 2, 1796, Timothy Pickering, then Secretary of State under President Washington, wrote to the Lieutenant Governor of Virginia,

> Our jurisdiction * * * has been fixed (at least for the purpose of regulating the conduct of the government in regard to any events arising out of the present European war) to extend three geographical miles (or nearly three and a half English miles) from our shores * * *.

I Moore, *Digest of International Law* (1906), p. 704.

In those times, the range of a cannon shot was considered equivalent to three miles,[6] and an early American treaty embodying the same principle was in those terms. The treaty of November 19, 1794, with Great Britain, provided:

> Neither of the said parties shall permit the ships or goods belonging to the subjects or citizens of the other, to be taken within cannon-shot of the coast, nor in any of the bays, ports, or rivers of their territories, by ships of war, or others having commission from any prince, republic, or state whatever. But in case it should so happen, the party whose *territorial rights* shall thus have been violated, shall use his utmost endeavours to obtain from the offending party, full and ample satisfaction for

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[6] See Secretary of State Jefferson's letter of November 8, 1793, to Mr. Hammond, the British minister: "* * * the smallest distance, I believe, claimed by any nation whatever, *is the utmost range of a cannon ball*, usually stated at one sea league." I Moore, *Digest of International Law* (1906) 702; emphasis in original. See also the letter of January 23, 1849, from Secretary of State Buchanan to Mr. Jordan, *infra*, p. 27.

> the vessel or vessels so taken, whether the same be vessels of war or merchant vessels.

Art XXV, 8 Stat. 116, 128 (emphasis added).

These actions, all taken before 1812, show that the policy of the United States to claim and recognize territorial waters of three miles and no more was well established before Louisiana became a State. Moreover, twice within six years after Louisiana became a State, the Federal Government reiterated its foreign policy in this regard. Article 11 of the Treaty with Algiers, of June 30 and July 6, 1815, provided,

> If a vessel of either of the contracting parties shall be attacked by an enemy within cannon-shot of the forts of the other, she shall be protected as much as is possible.

And, the Treaty of October 20, 1818, with Great Britain reverted to the more specific terms of three miles:

> And the United States hereby renounce, forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays, creeks, or harbours, of his Britannic Majesty's dominions in America, not included within the abovementioned limits * * *.

8 Stat. 248, 249.

By a long succession of subsequent actions, from 1849 to the present time, this policy has been continuously maintained.

On January 23, 1849, James Buchanan, Secretary of State under President Polk, wrote,

> The exclusive jurisdiction of a nation extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of sea inclosed by headlands; and, also, to the distance of a marine league, or as far as a cannon shot will reach from the shore along its coasts.

Letter to Mr. Jordan, I Moore, *Digest of International Law* (1906), p. 705.

In 1856, when Spain claimed jurisdiction over a belt of six miles around Cuba, Secretary of State William Marcy, at the direction of President Pierce, replied that the United States could not concede the extension of Spanish sovereignty beyond three miles. See letter of Secretary of State Seward to Gabriel Tassara, December 16, 1862, I Moore, *Digest of International Law* (1906) 706, 708.

William Seward, Secretary of State under President Lincoln, wrote on August 4, 1862, to Gideon Welles, Secretary of the Navy,

> This Government adheres to, recognizes, and insists upon the principle that the maritime jurisdiction of any nation covers a full marine league from its coast, and that acts of hostility or of authority within a marine league of any foreign country by

> naval officers of the United States are strictly prohibited * * *.

I Moore, *Digest of International Law* (1906) 705.

In 1874 Lord Derby, the British foreign minister, inquired as to the attitude of the United States toward the Spanish claim of two leagues. *Foreign Relations of the United States*, 1875, Pt. I, 641–642. To that inquiry Hamilton Fish, Secretary of State under President Grant, replied, in part:

> In reply I have the honor to inform you that this Government has uniformly, under every administration which has had occasion to consider the subject, objected to the pretension of Spain adverted to, upon the same ground and in similar terms to those contained in the instruction of the Earl of Derby.
>
> We have always understood and asserted that, pursuant to public law, no nation can rightfully claim jurisdiction at sea beyond a marine league from its coast.
>
> This opinion on our part has sometimes been said to be inconsistent with the facts that, by the laws of the United States, revenue-cutters are authorized to board vessels anywhere within four leagues of their coasts, and that by the treaty of Guadalupe Hidalgo, so called, between the United States and Mexico, of the second of February, 1848, the boundary line between the dominions of the parties begins in the Gulf of Mexico, three leagues from land.

It is believed, however, that in carrying into effect the authority conferred by the Act of Congress referred to, no vessel is boarded, if boarded at all, except such a one as, upon being hailed, may have answered that she was bound to a port of the United States. At all events, although the act of Congress was passed in the infancy of this Government, there is no known instance of any complaint on the part of a foreign government of the trespass by a commander of a revenue-cutter upon the rights of its flag under the law of nations.

In respect to the provision in the treaty with Mexico, it may be remarked that it was probably suggested by the passage in the act of Congress referred to, and designed for the same purpose, that of preventing smuggling. By turning to the files of your legation, you will find that Mr. Bankhead, in a note to Mr. Buchanan on the 30th of April, 1848, objected on behalf of Her Majesty's government, to the provision in question. Mr. Buchanan, however, replied in a note of the 19th of August, in that year, that the stipulation could only affect the rights of Mexico and the United States, and was never intended to trench upon the rights of Great Britain, or of any other power under the law of nations.

Letter of January 22, 1875; *Foreign Relations of the United States,* 1875, Pt. I, 649–650.

When an Italian royal decree of August 6, 1914, undertook to fix the limits of Italian territorial waters at six nautical miles, Robert Lans-

ing, then Acting Secretary of State under President Wilson, wrote to the Italian ambassador di Cellere, in part as follows:

> I am compelled to inform Your Excellency of my inability to accept the principle of the Royal Decree, in so far as it may undertake to extend the limits of the territorial waters beyond three nautical miles from the main shore line and to extend thereover the jurisdiction of the Italian Government.
>
> An examination into the question involved leads me to the conclusion that the territorial jurisdiction of a nation over the waters of the sea which wash its shore is now generally recognized by the principal nations to extend to the distance of one marine league or three nautical miles, that the Government of the United States appears to have uniformly supported this rule, and that the right of a nation to extend, by domestic ordinance, its jurisdiction beyond this limit has not been acquiesced in by the Government of the United States.

Letter of November 28, 1914; *Foreign Relations of the United States*, 1914, Supp., 665, I Hackworth, *Digest of International Law* (1940) 637–638.

On January 23, 1924, the United States entered into a treaty with Great Britain, permitting the United States to seize British vessels engaged in liquor smuggling within one hour's sailing dis-

tance of the shore. Article I of that treaty provided:

> The High Contracting Parties declare that it is their firm intention to hold the principle that 3 marine miles extending from the coast-line outwards and measured from low-water mark constitute the proper limits of territorial waters.

43 Stat. 1761. The same provision is contained in similar treaties entered into with Germany on May 19, 1924 (43 Stat. 1815), with Panama on June 6, 1924 (43 Stat. 1875), with the Netherlands on August 21, 1924 (44 Stat. 2013), with Cuba on March 4, 1926 (44 Stat. 2395), and with Japan on May 31, 1928 (46 Stat. 2446).

A Mexican decree of August 30, 1935, undertook to extend Mexican territorial waters from three to nine miles. On January 11, 1936, Robert W. Moore, the Assistant Secretary of State, instructed R. Henry Norweb, the American chargé d'affaires in Mexico,

> It is desired that you advise the Mexican Foreign Office in writing that your Government reserves all rights of whatever nature so far as concerns any effects upon American commerce from enforcement of this legislation purporting to amend existing law so as to extend the territorial waters of Mexico from three miles in breadth to nine miles.

I Hackworth, *Digest of International Law* (1940) 639–640. Such statement was made by letter of

March 7, 1936, from Mr. Daniels, American ambassador to Mexico, to General Eduardo Hay, Mexican Secretary for Foreign Relations. See letter of December 30, 1949, from James E. Webb, Under Secretary of State, to Senator Tom Connally, Senate Interior Committee Hearings on S. J. Res. 13, etc., 83d Congress, 1st Session, 321, 322.

On November 12, 1952, the United States protested in the following terms the claims of the Russian government to jurisdiction over more than three miles of territorial waters:

> I have the honor to inform your Excellency that the Government of the United States of America has noted with increasing concern the policy of the Union of Soviet Socialist Republics of asserting territorial jurisdiction over a belt of waters 12 nautical miles in breadth along its coasts and coasts under its control. My Government has also noted that in pursuing this policy the Soviet Union is permitting its authorities to violate the rights of nationals of other states in what are generally recognized as international waters by ordering the seizure and detention of foreign-flag vessels between 3 and 12 nautical miles off the coasts and otherwise denying them access to that area.
>
> It is the view of my Government that the Soviet Union, in thus attempting to appropriate to its exclusive use and control a portion of the high seas, has manifested a

willingness to deprive other states, without their consent, of rights under international law. Such conclusion is inescapable in the face of a territorial-waters policy whereunder the Soviet Union would supplant free and untrammeled navigation by all vessels and aircraft over water areas comprising a part of the high seas with such controls as that Government might apply. The Government of the United States of America is not aware of any principle of international law which would support and justify such a policy. In the circumstances, my Government finds it necessary to reiterate that it cannot recognize the action of any government which is calculated to assimilate adjacent high seas to its territory.

The Government of the United States of America therefore protests the Soviet Union's closure of a 12-mile belt of waters contiguous to its coasts and to the coasts under its control, and reserves all its rights and interests of whatever nature in the high seas outside 3 nautical miles from those coasts. [99 Cong. Rec. 4084–4085.]

This Court has also recognized the adherence of the United States to the three-mile rule:

It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a mar-

> ginal belt of the sea extending from the coast line outward a marine league, or three geographic miles.

Cunard S. S. Co. v. *Mellon*, 262 U. S. 100, 122.

In summary, beginning as early as 1793, and continuing throughout its history, the United States has adhered to a policy of claiming for itself and recognizing for other nations jurisdiction over a maritime belt only three geographic miles in width, insisting that no greater marginal belt is sanctioned by international law.

In view of that long history, uniformly and vigorously maintained, it should not be supposed that the United States intended by the Louisiana Enabling Act to establish a different rule. To do so would seem to abandon the contention that international law does not sanction a wider belt—the foundation on which the United States has rested its insistence on full freedom of the seas in all areas more than three miles from shore throughout the world. So radical a departure from the settled policy followed by the nation both before and after the date of the Enabling Act should not be inferred unless absolutely required by the clear language of that Act. However, the Act not only does not require such a construction, it does not even remotely support it, except by giving to its words a meaning very different from their plain and literal meaning. Where, as here, every consideration of history

and policy supports the construction of the act in accordance with its plain, apparent meaning, it is submitted that the Court should not attribute to it a different meaning, at variance alike with the clear words of the Act and the settled policy of the nation.

III. THE LOCATION OF THE NATION'S MARITIME BOUNDARY ALONG THE COAST OF LOUISIANA IS A POLITICAL QUESTION, AS TO WHICH THE UNVARYING HISTORIC DETERMINATION BY THE POLITICAL BRANCHES OF THE GOVERNMENT MUST BE DEEMED CONCLUSIVE

A. IT IS A BASIC PRINCIPLE THAT THE COURTS WILL ACCEPT EXECUTIVE DETERMINATIONS IN THE FIELD OF FOREIGN AFFAIRS

For reasons well grounded in the distribution of functions in our Government (*United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319–321; *Chicago & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 111), this Court has always insisted that American courts "should not so act as to embarrass the executive arm in its conduct of foreign affairs." *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 35; *Ex parte Peru*, 318 U. S. 578, 588; see *United States* v. *Lee*, 106 U. S. 196, 209. Decisions in the field of foreign policy are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & S. Air Lines* v. *Waterman*

Corp., 333 U. S. 103, 111. The courts, therefore, are bound to accept as correct and conclusive all declarations and determinations with respect to foreign affairs and foreign policy, made by the Executive Branch of the Government by formal rulings or official action taken in conducting the foreign affairs or formulating the foreign policy of the nation.

This general principle of judicial abstention from the domain of foreign affairs has been consistently applied in various fields touching on this country's international relations. For instance, the government recognized by the President as the government of a foreign sovereign state will be accepted without question (*Kennett* v. *Chambers*, 14 How. 38, 50–51; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *United States* v. *Belmont*, 301 U. S. 324, 330; *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 132–138), as will the "underlying policy" governing the executive recognition of the foreign government (*United States* v. *Pink*, 315 U. S. 203, 229) and executive recognition or non-recognition of another country's laws and ordinances (*Latvian State Cargo and Passenger Steamship Line* v. *McGrath*, 188 F. 2d 1000 (C. A. D. C.), certiorari denied, 342 U. S. 816; *The Maret*, 145 F. 2d 431 (C. A. 3); *Bernstein* v. *Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246, 249 (C. A. 2), certiorari denied, 332 U. S. 772). Similarly, a political determination of a state of war between foreign

states is binding on the courts. *United States* v. *Palmer,* 3 Wheat. 610, 634–635; *The Divina Pastora,* 4 Wheat. 52, 63–64. A certification by the State Department that a foreign vessel, sued in our courts, is state-owned and immune from seizure automatically leads to a dismissal of the action, whatever view of the vessel's immunity the court would have itself taken. *Ex parte Peru,* 318 U. S. 578, 588–590; *Republic of Mexico* v. *Hoffman,* 324 U. S. 30, 34–36. See *National City Bank* v. *Republic of China,* 348 U. S. 356, 360–361. Certificates by the State Department as to the diplomatic character of foreign representatives sued in our courts are likewise followed without question. *In re Baiz,* 135 U. S. 403, 421–422, 432; *United States* v. *Benner,* 24 Fed. Cas. No. 14,568 (C. C. E. D. Pa.) at 1086. Even treaties from which private rights flow will normally not be interpreted contrary to a definite position taken by the executive *vis-a-vis* a foreign country, especially where judicial intervention might well cause difficulties in the larger sphere of foreign relations. *Foster* v. *Neilson,* 2 Pet. 253, 307–309; *Williams* v. *Suffolk Insurance Co.,* 13 Pet. 415; *United States* v. *Reynes,* 9 How. 127, 153–155; *Charlton* v. *Kelly,* 229 U. S. 447, 468, 474–476; *Sullivan* v. *Kidd,* 254 U. S. 433, 442; *Factor* v. *Laubenheimer,* 290 U. S. 276, 295: cf. Jaffe, *Judicial Aspect of Foreign Relations* (1933), 71–78. This principle of judicial deference to formal executive determinations applies not only where

a foreign nation is directly involved (e. g., *Ex parte Peru*, 318 U. S. 578; *Republic of Mexico* v. *Hoffman*, 324 U. S. 30), but also where the direct controversy is wholly domestic. E. g., *United States* v. *Belmont*, 301 U. S. 324 (suit to recover money deposited by a Russian corporation with a New York banker); *United States* v. *Pink*, 315 U. S. 203 (suit to recover assets of a Russian insurance company in New York); *Chicago & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103 (controversy between two domestic airlines).[1]

B. TERRITORIAL SOVEREIGNTY IS A POLITICAL MATTER AS TO WHICH THE COURTS WILL FOLLOW AN EXECUTIVE DETERMINATION

1. *Foreign territories.*—Who is the sovereign of an area is a political question, the determination of which by one of the political branches of the Government is conclusive on the courts. Thus, in *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302, this Court, holding itself bound by an executive determination of which was the lawful government of Mexico, said:

> The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—

[1] See also *The Federalist*, Nos. 3, 80; *Holmes* v. *Jennison*, 14 Pet. 540, 570; *Henderson* v. *Mayor of New York*, 92 U. S. 259, 273; *Chy Lung* v. *Freeman*, 92 U. S. 275, 279–280; *Chinese Exclusion Case*, 130 U. S. 581, 606; *United States* v. *Rauscher*, 119 U. S. 407, 412–414; *Valentine* v. *U. S. ex rel. Neidecker*, 299 U. S. 5, 8; *Hines* v. *Davidowitz*, 312 U. S. 52, 63; *United States* v. *California*, 332 U. S. 19, 34–36.

> "the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

In *Kennett* v. *Chambers*, 14 How. 38, 50–51, this Court refused to determine for itself whether Texas had in fact become independent of Mexico before 1837, when the Republic of Texas was formally recognized by our Government:

> It is a sufficient answer to the argument to say that the question whether Texas had or had not at that time become an independent state, was a question for that department of our government exclusively which is charged with our foreign relations. And until the period when that department recognized it as an independent state, the judicial tribunals of the country were bound to consider the old order of things as having continued, and to regard Texas as a part of the Mexican territory.

In *Jones* v. *United States*, 137 U. S. 202, 221, this Court held itself bound by the Executive's determination that the island of Navassa was not subject to the jurisdiction of Haiti. The Court said:

> * * * the duty of the judiciary is to decide in accordance with what the President, in the exercise of a discretionary power confided to him by the Constitution and laws, has actually done. As was adjudged, under like circumstances, in *Williams* v. *Suffolk*

Ins. Co., 13 Pet. 415, 420, before quoted, if the executive, in his correspondence with the government of Hayti, has denied the jurisdiction which it claimed over the Island of Navassa, the fact must be taken and acted on by this court as thus asserted and maintained; it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong; it is enough to know that in the exercise of his constitutional functions he has decided the question.

Similarly, in *Williams* v. *Suffolk Insurance Co.*, 13 Pet. 415, 420, in holding itself bound by the executive determination that the Falkland Islands were not subject to the jurisdiction of Buenos Aires, this Court said:

> And can there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view, it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he had decided the question. Having done this, under the responsibilities which belong to him, it is obligatory on the people and government of the Union.

See also *Pearcy* v. *Stranahan*, 205 U. S. 257, 265.

2. *Territory of the United States.*—This rule is equally applicable to the determination of whether particular areas are within the jurisdiction of the United States. In *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, 380–381, regarding the question of whether Bermudan military bases leased from Great Britain by the United States were subject to the sovereignty of the latter, this Court said:

> * * * is this a political question beyond the competence of courts to decide? * * * Recognizing that the determination of sovereignty over an area is for the legislative and executive departments * * * does not debar courts from examining the status resulting from prior action.

The Court accepted the statement of the Legal Adviser of the State Department that "The arrangements under which the leased bases were acquired from Great Britain did not and were not intended to transfer sovereignty over the leased areas from Great Britain to the United States."

In *Jones* v. *United States*, 137 U. S. 202, *supra*, this Court held itself concluded by an executive determination that the island of Navassa had been brought under the jurisdiction of the United States under the Guano Islands Act of August 18, 1856, 11 Stat. 119, 48 U. S. C. secs. 1411–1419. Similarly, an executive determination that the

Isle of Pines was not territory of the United States was held conclusive in *Pearcy* v. *Stranahan*, 205 U. S. 257. Accord, *Foster* v. *Neilson*, 2 Pet. 253, 307–309.

Specifically, executive determinations have been accorded judicial recognition as being decisive of the question of American sovereignty over the waters bordering our coasts. Thus, in *In re Cooper*, 143 U. S. 472, this Court indicated that it would be bound by what it understood to be an executive determination that the jurisdiction of the United States extended to all the waters of the Bering sea east of the demarcation line described in the Russian cession treaty of March 30, 1867 (15 Stat. 539), whether or not within three miles of the shore.[8] Following the same principle, the ruling of Attorney General Randolph that Dela-

[8] After *In re Cooper* was decided in 1892, the United States disavowed all claim to own the waters of Bering sea more than three miles from land. XII *Fur Seal Arbitration, Proceedings of the Tribunal of Arbitration at Paris, 1893*, Oral Argument for the United States, pp. 107–110. This does not, of course, detract from the force of the Court's prior indication that it would consider itself bound by the executive action in the matter. Indeed, the United States was careful to point out to the arbitration tribunal that the courts, in deciding *In re Cooper* and similar cases, had felt themselves bound by the actions of the political branches of the Government, observing that "Lastly, the United States courts, whenever the question has come up before them, have refused to interfere with the executive branch of the Government in its interpretation of the treaty of 1867 and of the laws of Congress enacted on the basis of what the United States acquired by this treaty." II, *op. cit.*, Case of the United States, p. 84.

ware Bay was inland water within the jurisdiction of the United States (1 Op. A. G. 32 (1793)) was relied on by the Second Court of Commissioners of *Alabama* Claims, in holding the Chesapeake Bay similarly territorial. *The Alleganean: Stetson* v. *United States,* IV Moore, *International Arbitrations,* 4332, 4341. Similarly, Secretary of State Jefferson's letter to Minister Genet (*supra,* p. 24), asserting jurisdiction over a marginal belt of three miles, was one of the authorities relied on by this Court in *United States* v. *California,* 332 U. S. 19, 33–34, in saying:

> That the political agencies of this nation both claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact. * * * And this assertion of national dominion over the three-mile belt is binding upon this Court.

As is shown, *supra,* pages 23–35, the political branches of the Government have consistently adhered to the rule that this country has a marginal belt of three miles and no more.[9] Under the circumstances of this case that determination should be considered conclusive here. Section 4 of the Submerged Lands Act, validating state statutes extending maritime boundaries out to three miles from the coast (Appendix, *infra,* pp. 48–49), may be taken as validating, *pro tanto,* Louisiana Act

[9] In *United States* v. *California,* 332 U. S. 19, 33–34, fn. 18, the Court recognized Congressional assertions of a three-mile territorial zone.

55 of 1938 (Appendix, *infra*, p. 49), which purported to extend the state boundary to a distance of twenty-seven miles, or Louisiana Act 33 of 1954 (Appendix, *infra*, p. 52), purporting to fix the boundary at three leagues. It is therefore unnecesary to consider whether Louisiana had a three-mile boundary before those enactments, either by virtue of the general federal claim of three miles or otherwise. It is sufficient to know that, for the purposes of the Submerged Lands Act, the maritime boundary of the State is three miles in the Gulf of Mexico.

CONCLUSION

For the foregoing reasons it is submitted that the decree of December 11, 1950, herein, should be modified to exclude from its scope all submerged lands lying within three miles seaward of the line of ordinary low-water and the outer limit of inland waters, and the proceeds of such lands.

Respectfully,

HERBERT BROWNELL, JR.,
Attorney General.
SIMON E. SOBELOFF,
Solicitor General.
J. LEE RANKIN,
Assistant Attorney General.
OSCAR H. DAVIS,
JOHN F. DAVIS,
Special Assistants to the Attorney General.
GEORGE S. SWARTH,
Attorney.

MAY 1955.

1. **Act of February 20, 1811, 2 Stat. 641:**

Chap. XXI.—*An Act to enable the people of the Territory of Orleans to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original states, and for other purposes*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the territory or country ceded under the name of Louisiana, by the treaty made at Paris on the thirtieth day of April, one thousand eight hundred and three, between the United States and France, contained within the following limits, that is to say: beginning at the mouth of the river Sabine, thence by a line to be drawn along the middle of the said river, including all islands to the thirty-second degree of latitude; thence due north, to the northernmost part of the thirty-third degree of north latitude; thence along the said parallel of latitude to the river Mississippi; thence down the said river to the river Iberville; and from thence along the middle of the said river and lakes Maurepas and Ponchartrain, to the gulf of Mexico; thence bounded by the said gulf to the place of beginning; including all islands within three leagues of the coast, be, and they are hereby authorized to form for themselves a constitution and state government, and to assume such name as they may deem

proper, under the provisions and upon the conditions herein after mentioned.

* * * * *

2. Submerged Lands Act, Public Law 31, 83d Congress, 1st Sess., approved May 22, 1953, 67 Stat. 29:

AN ACT

To confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to confirm the jurisdiction and control of the United States over the natural resources of the seabed of the Continental Shelf seaward of State boundaries

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Submerged Lands Act".

TITLE I

DEFINITION

SEC. 2. When used in this Act—

(a) The term "lands beneath navigable waters" means—

* * * * *

(2) all lands, permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became

a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles * * *;

* * * * *

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 4 hereof but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

* * * * *

TITLE II

LANDS BENEATH NAVIGABLE WATERS WITHIN STATE BOUNDARIES

SEC. 3. Rights of the States.—

(a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and

natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) (1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States hereby releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters * * *.

* * * * * *

SEC. 4. Seaward Boundaries.— * * * Any State admitted subsequently to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line * * *. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three

geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

* * * * *

3. Act 55 of 1938, approved June 30, 1938, Louisiana Acts 1938, p. 169, 6 Dart. Louisiana General Statutes (1939) sections 9311.1–9311.4:

AN ACT

To declare the sovereignty of Louisiana along its seacoast and to fix its present seacoast boundary and ownership

Whereas dominion, with its consequent use, ownership and jurisdiction, over its marginal waters by a State has found support because it is the duty of a State to protect its citizens whose livelihood depends on fishing, or taking from said marginal waters the natural products they are capable of yielding; also, has found support in that sufficient security must exist for the lives and property of the citizens of the State;

Whereas, according to the ancient principles of international law it was generally recognized by the nations of the world that the boundary of each sovereign State along the seacoast was located three marine miles distant in the sea, from low water mark along its coast on the open sea;

Whereas, the seaward boundary of each sovereign State as so fixed is generally known as the three-mile limit of such State;

Whereas, the said three-mile limit was so recognized as the seaward boundary of

each sovereign State, because at the time it became so fixed, three marine miles was the distance of a cannon shot and was considered the distance at which a State could make its authority effective on the sea by the use of artillery located on the shore;

Whereas, since the said three-mile limit was so established as the seaward boundary of each sovereign State, modern cannon have been improved to such an extent that now many cannon shoot twenty-seven marine miles and more and by the use of artillery located on its shore a State can now make its authority effective at least twenty-seven marine miles out to sea from low water mark;

Whereas, by the Act of Congress of February 20th, 1811, by which the State of Louisiana was admitted to the United States as a State, the southern boundary of Louisiana was fixed as follows: "thence bounded by the said gulf to the place of beginning, including all islands within three leagues of the coast;"

Whereas, therefore, the gulfward boundary of Louisiana is already located in the Gulf of Mexico three leagues distant from the shore, a width of marginal area made greater, by the above Act and agreement, than the well-accepted and inherent three-mile limit;

Whereas, a State can define its limits on the sea;

Whereas, the State of Louisiana owns the waters of the sea and the waters of the arms of the sea and the bed of the sea, the bed of the arms of the sea, and the seashore and the shores of all arms of the sea as far inland as the high water mark within the territory of the State of Louisiana; and

Whereas, the State of Louisiana, including all parts thereof and all territory that may be added thereto, forms a part of the United States of America, over which the said United States is authorized to exercise and exercises such powers and jurisdiction as the said United States is authorized by the Constitution of the United States to exercise thereover;

Section 1. Be it enacted by the Legislature of Louisiana, That the gulfward boundary of the State of Louisiana, is hereby fixed and declared to be a line located in the Gulf of Mexico parallel to the three-mile limit as determined according to said ancient principles of international law, which gulfward boundary is located twenty-four marine miles further out in the Gulf of Mexico than the said three-mile limit.

Section 2. That, subject to the right of the government of the United States to regulate foreign and interstate commerce under Section 8 of Article 1 of the Constitution of the United States, and to the power of the government of the United States over cases of admiralty and maritime jurisdiction under Section 2 of Article 3 of the Constitution of the United States, the State of Louisiana has full sovereignty over all of the waters of the Gulf of Mexico and of the arms of the Gulf of Mexico within the boundaries of Louisiana, as herein fixed, and over the beds and shores of the Gulf of Mexico and all arms of the said Gulf within the boundaries of Louisiana, as herein fixed.

Section 3. That the State of Louisiana owns in full and complete ownership the waters of the Gulf of Mexico and of the arms of the said Gulf and the beds and

shores of the Gulf of Mexico and the arms of the Gulf of Mexico, including all lands that are covered by the waters of the said Gulf and its arms either at low tide or high tide, within the boundaries of Louisiana, as herein fixed.

Section 4. That this Act shall never be construed as containing a relinquishment by the State of Louisiana of any dominion sovereignty, territory, property, or rights that the State of Louisiana already had before the passage of this Act.

4. Louisiana Act 33 of 1954, approved June 21, 1954.

AN ACT

To amend and re-enact Section 1 of Title 49 of the Louisiana Revised Statutes of 1950 relative to state water boundaries; gulfward boundary

Whereas, under authority of Section 3 of Article IV of the United States Constitution, the United States Congress admitted Louisiana as a State into the Union in April. 1812, and fixed its gulfward boundary at 3 leagues from coast.

Whereas, in compliance with Acts of Congress of February 10, 1807, 2 Stat. 413, and of February 19, 1895, 28 Stat. 672, 33 U. S. C. 151, the coast line of the State of Louisiana was officially designated and defined by bearings, light-houses, buoys and coast objects, as shown in Section 1 herein;

Whereas, the United States Supreme Court has held that the waters inside of the coast line designated and defined under said Act of February 19, 1895, are "as much a part of the inland waters of the

United States within the meaning of this Act as the harbor within the entrance" and another Federal Court held that said Act "was for the purpose of defining the inland waters of the United States."

Whereas, the United States Congress, by its "Tidelands" Act, approved May 22, 1953, 67 Stat. 32, recognized and confirmed State ownership of the lands beneath navigable waters within the State's boundaries, and the natural resources, including oil, gas, and all other minerals, and fish, shrimp, oysters, and other marine animal and plant life within such lands and waters; and said Tidelands Act adopted State boundaries in the Gulf of Mexico as they existed at the time such State became a member of the Union not more than 3 marine leagues into the Gulf of Mexico from the coast line, which "coast line" is defined in said Act as that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters; and

Whereas, the State of Louisiana owns these submerged lands and natural resources within such land and waters in trust for its people, and the economic welfare of the State and the public services dependent upon the State revenues to be derived from these valuable natural resources require that the State's historic boundary be redefined to avoid confusion and to clarify the situation with regard thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. Section 1 of Title 49 of the Louisiana Revised Statutes of 1950 is hereby amended and reenacted to read as follows:

§ 1. Gulfward boundary. The historic gulfward boundary of the State of Louisiana extends a distance into the Gulf of Mexico 3 marine leagues from coast?

The coast or coast line of the State of Louisiana is accepted and approved as designated and defined in accordance with applicable Acts of Congress, as follows: From Ship Island Lighthouse to Chandeleuer Lighthouse; thence in a curved line following the general trend of the seaward, high-water shore lines of the Chandeleuer Islands to the Southwesternmost extremity of Errol Shoal; thence to Pass-a-Loutre lighted whistle buoy 4 to South Pass lighted whistle buoy 2; thence to Southwest Pass entrance midchannel lighted whistle buoy; thence to Ship Shoal lighthouse; thence to Calcasieu Pass lighted whistle buoy 1; thence to Sabine Pass lighted whistle buoy 1, as designated and defined under authority of the Act of Congress of February 19, 1895, 28 Stat. 672, 33 U. S. C. 151 as amended, and as is shown on the attached chart showing the coast line of the State marked thus - - - and showing the State gulfward boundary by a solid line 3 marine leagues from coast, which chart shall be paraphed by the Speaker of the House of Reprgsentatives, the President of the Senate and by the Governor to be identified herewith.

Section 2. That all laws or parts of laws in conflict herewith be and they are hereby repealed with the exception that the designation on the attached plat of the common boundaries of the coastal parishes of the State of Louisiana shall not be taken or interpreted as in any manner changing or affecting the interior or inland bound-

aries of any said coastal parishes as now existing or fixed by applicable State laws, nor shall said plat be taken or construed, as intending to affect the common maritime boundary between this State and the States of Mississippi and Texas.

Section 3. The Governor having certified to the legislature during the session of the legislature the necessity for the immediate passage of this Act, this Act shall become effective upon approval thereof by the Governor.

U. S. GOVERNMENT PRINTING OFFICE: 1956

SEP 18 1950
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1950

No. 12 ORIGINAL

UNITED STATES OF AMERICA, Plaintiff

versus

STATE OF LOUISIANA

MOTION FOR LEAVE TO FILE BRIEF BY AMICUS CURIAE

Comes Frank J. Looney, a member of the bar of this Court, and moves for leave to file a brief as Amicus Curaie to this case.

The purpose of this brief is to call the Court's attention to decisions of this Court and its justices attesting to the existence of the Marine League when and before the constitution was adopted and its recognition by "all public writers." (Story)

And to show that Thomas Jefferson as Secretary of State treated this principle as accepted by all nations.

None of these decisions cited in the brief have been presented heretofore.

This appearer was consulted by the Assistant to the Attorney General of Louisiana who had charge of the case; but appearer did not concur in the theory of the State's answer or its brief.

The Solicitor General refuses his consent but states he will not oppose this motion. The Attorney General of Louisiana, who tenders no other brief, approves this filing.

FRANK J. LOONEY
As Amicus Curiae

Supreme Court of the United States

OCTOBER TERM, 1950

No. 12 ORIGINAL

UNITED STATES OF AMERICA, Plaintiff

versus

STATE OF LOUISIANA

BRIEF OF AMICUS CURIAE ON MOTION FOR REHEARING.

FRANK J. LOONEY

LECOMTE, SHREVEPORT, LOUISIANA

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The purpose of this brief is to call to the attention of the Court authorities not noticed by the Court in its decisions in the suits brought by the United States against the State of Louisiana.

Justice Story in 1812, in the case of *The Ann. F. C. 397* wrote: "*All the writers* upon public law *agree* that *every* nation has *exclusive jurisdiction to the distance of a cannon shot* over the waters adjacent to its shores." (All emphasis herein is that of this writer.)

He cited Bynkershoek (whom Justice Iredell, in Ware v. Hylton, called "a great authority").

He published the book quoted by Justice Story in 1737, fifty years before our Constitution was written and forty, less one, before the Declaration of Independence.

Justice Story quoted Azuni. Azuni quotes Bynkershoek as declaring the marginal belt to be one league. Azuni himself advocates extending this to two leagues.

Azuni cites treaties entered into many years before 1794, (the date given in the California Case, for establishment of the 3 mile limit) in which the Marine league was acknowledged.

The Supreme Court, in its note No. 10, in the California Case, gives Azuni as an authority for its holding that the Treaty between the U. S. and Great Britain in 1794 first established the 3 mile belt, naming an edition of 1806. Since this date is prior to 1812 when The Ann was decided, Justice Story must have known of that edition but he makes no mention of the authority of a treaty of 1794.

Justice Story does cite, however, the decision of Chief Justice Marshall in Church v. Hubbart, 2 Cranch 187, 237, which held, "The authority of a Nation within its own territory is absolute and exclusive. The seizure of a vessel within *the range of its cannon shot* by a foreign force is *an invasion* of that territory, and is an hostile act which is its duty to repel."

We find the Attorney for Church arguing (p. 199) as follows: "*By the law of Nations* territorial jurisdiction *can extend only to the distance of a cannon shot* from the shore." Vattel b. 1, c. 23, s. 280, 89."

Counsel for defendant (2 Cr. 226) said "But every nation has a right to appropriate *to her own* use a portion

of the sea about her shores." And Chief Justice Marshall said p. 234 "The authority of a nation within *its own territory* is absolute and exclusive. Etc."

In an opinion which evidenced great study the District Court in the case of "The Grace and Ruby" in 283 Fed. on pp. 477-8 said: "Church v. Hubbart has never been overruled" — (This was before the California decision).

In Corfield v. Coryell, FC 3,230, decided by Justice Washington, that the marine belt belonged to New Jersey is clearly and tersely stated in these words: "If the Bay, Delaware, was not granted by the Duke of York to Lord Berkeley and Sir George Curtis, then it remained in the grantor, and became vested in him as King, upon his accession to the Crown, and by the revolution, one half, *or at least* to the extent of *a league from the Coast*, became vested in New Jersey."

It will be noted — this is to be found in the grant of Charles II to his brother the Duke of York — and it is recited in the Corfield Case in 6 Fed. Cases p. 553 — the grant included "is lands, soils * * waters * * and *all other royalties* x x to the same belonging and appertaining."

Corfield v. Coryell has been cited times innumerable by the Supreme Court and other Federal Courts and this applies especially to that section reported 6 Fed. Cas. 551 in these words "The grant to Congress to *regulate commerce* on the navigable waters belonging to the several states, renders these waters the *public property* (i. e. *The*

paramount right) of the United States, for *all* the purposes of navigation and commercial intercourse: subject only to congressional regulation.

> "*But, this grant contains no cession* either express or implied, *of territory, or of public or private property.*
>
> "The jus privatum which a State has in the soil *covered by "its waters,* is totally distinct from the jus publicum with which it is closed."

This decision was rendered 39 years after the treaty with Great Britain, by a Justice who sat on the Court from 1798 and was thoroughly familiar with the construction and effect of the treaty signed in 1794, but never once mentioned it in his opinion.

II

These decisions have concluded the right of the United States to raise a question as to the sovereign rights of the original States to the Marine League limit.

However, other decisions rendered by the Court when Marshall was Chief Justice fortify this right.

In Rose v. Himely, 4 Cranch 241, 273-4, the Supreme Court of the United States recognized French decrees as to the seizure of "vessels * * at a less distance than *two leagues* from the Coast," in the words of Chief Justice Marshall on p. 274 "*Nothing can be more obvious* than that these are *strictly territorial regulations* proceeding from the Sovereign power of San Domingo, and *intended to enforce Sovereign rights.*" He continues: "Seiz-

ure for a breach "of this law is to be made only within those limits over which the Sovereign claimed a right to legislate, *in virtue of that exclusive dominion which every nation* possesses within its own territory and *within such a distance from the land as may be considered a part of its territory.* This power is the same in peace as in war."

In Hudson v. Guestier, 6 Cranch 281, 284 — Justice Livingston said, "Considering, then, as settled that the French tribunal had jurisdiction of property seized under a Municipal regulation, *within the territorial* jurisdiction of the Government of San Domingo, it only remains, etc."

In another case with a similar name to that decided by Justice Story but spelled "The ANNE, Barnabeau — Claimant" 3 Wheaton 435, Claimant's counsel, Harper on p. 437, argued, "The text writers affirm the immunity of the neutral territory from hostile operations in its ports, bays and harbors, and within range of cannon-shot along its coasts," citing (in A. D. 1818) Vattel, Bynkershoek, Martens, and Azuni (It is significant that 24 years after the British Treaty it was not referred to, as it was not in the other cases). Justice Story as the organ of the Court, said, p. 445 — "and without entering into a minute examination, in this conflict of testimony, we are of the opinion that the weight of the evidence is, decidedly that the capture was made *within the territorial limits of Spanish San Domingo.*"

Thus it is clearly demonstrated that the marginal belt *to the* distance *of a cannon shot* or reasonably further

was and *is the exclusive territory* of the adjacent Coastal Nation or colonial possession.

III

The Supreme Court, in the California Case, referred to the letters of Jefferson of date Nov. 8, 1783, and the brief of the State of Louisiana opposing "The Motion for Judgment" called attention in a note numbered 7, page 64 of brief to the language of the letters addressed to the British and French Ministers. This reference being "to the distance of one sea league" of which Jefferson wrote on Nov. 8, 1783, "*This distance can admit of no opposition* * * it is as *little, or less than is claimed by any of them on their own Coasts.*"

"Hence resulted the principles laid down in Harcourt v. Galliard, 12 Wheaton 526, that *the boundaries of the United States were the external boundaries of the States;* and that *the United States did not acquire any territory by the Treaty of Paris in 1783.*" (R. I. vs. Mass., 12 Peters 729).

Under note 16 of the California Case we read, "Secretary of State Jefferson in a note to the British Minister, in 1783, pointed to the nebulous assertion of territorial rights in the marginal belt."

Was the letter which Jefferson wrote to Governor Morris, our Minister to Great Britain, of an earlier date, viz — Aug 16, 1783, nebulous? Referring to the three vessels captured by the French from the British, he wrote:

"The Williams is said to have been taken within 2 miles of the United States * * * The Brig Fanny was alleged to have been taken within 5 miles of our shore; The Catherine within 2 miles and ½." It is an essential attribute of every country to preserve peace, to punish acts in breach of it, and restore property taken by force, *within its limits.*"

2 miles; 2½ miles; and 5 miles, Jefferson held to be within our limits.

In that same letter of Aug. 16, 1783, he wrote "Accordingly, this right of protection *within its waters and to a reasonable* distance on the Coasts, has been *acknowledged by every nation* and *denied* by none."

IV.

BOUNDARY

Throughout the trial the Solicitor General insisted that the United States v. Louisiana was not in any way a boundary suit. In his appearance before the Committee considering Senate Res. 185 he stated that this act must be passed to cover the interim until the Supreme Court would decide *the question of boundaries* of the littoral States, which was to be done as a result of the Court's decision and in the same proceedings without the necessity of filing a boundary suit.

All admit that the submerged lands involved in the suits against Louisiana and Texas are in the Gulf of Mexico.

All must admit that the boundaries of Louisiana and Texas as claimed by those States extend into the Gulf of Mexico.

The government would place the submerged lands of the Gulf of Mexico, as far as they may be described in the respective suits, in the United States, but out of Louisiana and Texas.

The Court, in the Louisiana Case states, "We intimate no opinion on the power of a State to extend, define or establish its external territorial limits or on the consequence of such an extention vis a vis persons other than the United states or those acting on behalf of or pursuant to its authority. *The matter of State boundaries has no bearing on the present problem.*"

If the State has the power to extend its littoral boundaries, by doing so its extends the boundaries of the United States; for the Supreme Court has held in Harcourt v. Galliard, 12 Wheaton 526 and in Rhode Island v. Massachusetts, 12 Peters, that "The boundaries of the United States were the external boundaries of the States," and that the United States did not acquire any territory by the Treaty of Paris in 1783." 12 Peters 729. And "No State should be deprived of property for the benefit of the United States, 1 Laws US 17."

V.

We ask the attention of the Court to the first article of the Treaty of Cession from France to the United States.

It recites that the Treaty of St. Ildephonso required the retrocession by Spain to France of "the Colony or province of Louisiana with the same extent that it now has in the hands of Spain, and that it had when France possessed it; and such as it should be after the treaties subsequently entered into between Spain and other States."

"The first consul of the French Republic (Napolean Bonaparte) doth hereby cede to the United States, in the name of the French Republic, for ever and *in full sovereignty*, the said territory, *with all its rights and appurtences.*"

The Southern portion of this territory became the Territory of Orleans and then the State of Louisiana. Whereupon Congress definitely described the State as bounded by the Gulf of Mexico, following the Language of the Louisiana Constitution, which in Louisiana and Mississippi 202 U. S., was interpreted by the Supreme Court as "*the open Gulf*" and distinguished from the "maritime belt."

VI.

1. Louisiana was ceded by France "in full sovereignty," in 1803.

   This was 9 years after 1794.

2. The Republic of Texas was recognized by the United States in 1837; that as a Republic it extended its territory 3 leagues into the Gulf of Mexico.

   This was 43 years after 1794.

3. California was a part of Mexico until 1848, or 54 years after 1794.

If the Marine League was established in 1794 as integral territory it was part of the territory and within the external boundaries of the 3 States, before they were admitted.

4. The treaty of Guadalupe—Hidalgo agreed that the territorial limit of Mexico was 3 leagues in the Gulf.

This was an admission on the part of the United States as were Great Britain's admissions in the Treaty of Peace.

The boundaries admitted by Great Britain in the provisional treaty of 1782 and the definitive treaty of 1783, were not created by the treaty, but were those of sovereign States existing in 1776; whose boundaries on the sea were only limited by international law.

By the admission of that treaty all islands within 20 leagues of the shore belonged to the individual States, which comprised the Confederation, which in 1783 was about as nebulous as any union of sovereign states could be.

Surely no action taken by the United States and Great Britain could create an "ownership in the federal union of a strip of submerged land between an island and the State to which it was apurtenant, in fact an integral part — for instance Long Island, of New York.

VII

The case of Skiriotes v. Florida, 313 US 69 was referred to in United States v. California.

The doctrine of this case furnishes a solution which would avoid all the evil consequences which arise and will flow from the present situation. On page 73 we find "Aside from the question of the extent of control which the United States may exert in the interest of self protection over waters near its borders, although beyond its territorial limits, the United States is not debarred by any rule of International Law from *governing the conduct of its* own citizens upon the high seas when the *rights* of other nations and their nationals are not infringed."

Among citations in note 2 are Church v. Hubbart, and "The Grace and Ruby." Chief Justice Holmes wrote the opinion — By exerting its right of defense the United States may keep all foreigners a distance from its shores; and by imposing conditions which must be complied with it may control the operations of its own citizens.

313 US p. 78 cites from "The Hamilton 207 US 403" as follows: "The bare fact of the parties being outside the territory *in a place belonging to no other sovereign* would not limit the authority of the State."

Whatever might be the high seas would fall under the regulations of Congress whether on the surface or under the surface of the sea. In other words "ALL PARAMOUNT RIGHTS" of the United States are unrestrictedly within the power of Congress.

These are the right to regulate commerce and navagation, and the right to establish lines of defense in the open ocean for the purpose of protecting the United States and its citizens from foreign invasion or other interference with common welfare

It is respectfully submitted that a rehearing should be granted.

FRANK J. LOONEY
As Amicus Curiae

APPENDIX

In addition to cases heretofore cited, recognition of the principle that the 3 mile marginal belt is within the territorial limits of a State is to be found in the following cases:

The Delaware, 161 US 469;

Manchester v. Massachusetts, 139 US 240;

McReady v. Virginia, 94 US 291;

Skiriotes v. Florida, 313 US 691;

In re Devoe, 108 US 401;

Hamburg American S.S. Co. v. Grube, 196 US 407, 413-4;

Lowndes v. Hunting, 153 US 1;

Findley v. The William, FC 4790;

Maxon v. The Fanny, FC 9095;

United States v. Kessler, FC 15,528;

United States v. New Bedford, FC 15607;

The Wave, FC 17297;

United States v. Newark Meadows, 173 Fed. 426;

Middleton v. Transatlantique, 100 Fed. 866 — certiorari denied 178 US 683.

Carlson v. Pilots Ass'n, 93 F. 468, 472;

Re Humboldt Mfg. Co.; 161 Fed. 364;

Humboldt v. Christophenson, 72 Fed. 329;

The Norma, 32 Fed. 411;

The Rose Mary, 23 Fed. 103.

See also Chase v. American S. S. Co., 9 Rhode Island 419, 1 Am. Rep. 374, citing 6 Dana Abridgement 359 showing 3 mile maritime belt in Massachusetts Charter of 1691.